

37 Am. Jur. 2d Fraudulent Conveyances and Transfers I Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

I. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  1, 2.1, 5, 6, 54, 62

A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  1, 2.1, 5, 6, 54, 62

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 1

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

I. In General

§ 1. Generally; definitions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  1

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 128](#) (Jury instructions—Right of debtor to sell property in absence of fraud)

Although one can generally dispose of his or her property as one sees fit,¹ a person cannot frustrate his or her creditor's rights² and avoid obligations by changing title to his or her assets.³ The fraudulent transfer of assets is considered a tort,⁴ and preventing the avoidance of obligations in this way is the point of an action under the fraudulent conveyance law, which is a tort action⁵ distinguishable from ordinary fraud.⁶ Thus, the purpose of a fraudulent transfer claim is the removal of obstacles which prevent the enforcement of a judgment.⁷ State fraudulent transfer law generally attempts to protect creditors from transactions which are designed to, or have the effect of, unfairly draining the pool of assets available to satisfy creditor claims or which dilute legitimate creditor claims at the expense of false or lesser claims.⁸

A fraudulent conveyance or transfer is a transfer by the debtor of property to a third person undertaken with the intent to hinder, delay, or defraud his or her creditors⁹ by preventing a creditor from reaching that interest to satisfy its claim¹⁰ or by effecting insolvency on the part of the transferring entity.¹¹ It is also defined as a transfer made without fair consideration by a debtor when he or she is insolvent or which renders him or her insolvent or by a defendant in an action for money damages who is unable to satisfy the judgment that the plaintiff finally obtains.¹² Fraudulent conveyance is, at its core, a diminution of the debtor's estate to the detriment of the creditor's right of realization.¹³ It prevents debtors from placing property beyond reach

of their creditors when those assets should legitimately be made available to satisfy creditor demands.¹⁴ Consequently, if a debtor disposes of property, whether it be real or personal property,¹⁵ or goods or titles,¹⁶ with the intent to delay or defraud his or her creditors, the disposition may be set aside.¹⁷ Furthermore, debtors are prohibited from transferring substantially all of their assets to another to defraud a creditor or avoid a debt,¹⁸ especially where the transfer is not supported by adequate consideration¹⁹ or where a general scheme or plan to strip a debtor of his or her assets is made with no regard to the needs of creditors.²⁰ The laws of fraudulent conveyances protects creditors, not debtors.²¹

CUMULATIVE SUPPLEMENT

Cases:

In the context of common-law fraudulent conveyances, the fraudulent conduct is not in dishonestly inducing a creditor to extend a debt but, rather, is in the acts of concealment and hindrance. *Husky Intern. Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Jacksonville Bulls Football, Ltd. v. Blatt](#), 535 So. 2d 626 (Fla. 3d DCA 1988).
- 2 [Hartford-Carlisle Sav. Bank v. Shivers](#), 552 N.W.2d 909 (Iowa Ct. App. 1996).
- 3 [Jones v. Veit](#), 6 Ohio Misc. 2d 4, 453 N.E.2d 1299 (C.P. 1982).
- 4 [Walker v. Anderson](#), 232 S.W.3d 899 (Tex. App. Dallas 2007).
- 5 [S.E.C. v. Infinity Group Co.](#), 27 F. Supp. 2d 559 (E.D. Pa. 1998); [Filip v. Bucurenciu](#), 129 Cal. App. 4th 825, 28 Cal. Rptr. 3d 884 (3d Dist. 2005).
- 6 [Nobles v. Marcus](#), 533 S.W.2d 923 (Tex. 1976).
The law of fraudulent conveyances is also distinguishable from other doctrines, for example, assignments for the benefit of creditors. As to the nature of assignments for the benefit of creditors, see [Am. Jur. 2d, Assignments for Benefit of Creditors](#) §§ 1 to 3.
- 7 [Hoesman v. Sheffler](#), 886 N.E.2d 622 (Ind. Ct. App. 2008).
- 8 [Grede v. Bank of New York Mellon](#), 441 B.R. 864 (N.D. Ill. 2010), *aff'd*, 689 F.3d 855 (7th Cir. 2012) (applying Illinois law).
- 9 [Flores v. Robinson Roofing & Const. Co., Inc.](#), 161 S.W.3d 750 (Tex. App. Fort Worth 2005).
- 10 [Kirkeby v. Superior Court of Orange County](#), 33 Cal. 4th 642, 15 Cal. Rptr. 3d 805, 93 P.3d 395 (2004).
- 11 [Thompson v. Hanson](#), 168 Wash. 2d 738, 239 P.3d 537 (2009).
- 12 [Palermo Mason Const., Inc. v. Aark Holding Corp.](#), 300 A.D.2d 458, 752 N.Y.S.2d 99 (2d Dep't 2002).
- 13 [In re Wellington Apartment, LLC](#), 350 B.R. 213 (Bankr. E.D. Va. 2006) (applying Virginia law); [Buchanan v. Buchanan](#), 266 Va. 207, 585 S.E.2d 533 (2003).
- 14 [In re Brobeck, Phleger & Harrison LLP](#), 408 B.R. 318 (Bankr. N.D. Cal. 2009), reconsideration granted in part, 2010 WL 377679 (Bankr. N.D. Cal. 2010) and leave to appeal denied, 2010 WL 3448240 (N.D. Cal. 2010).
- 15 [Ralfs v. Mowry](#), 586 N.W.2d 369 (Iowa 1998).
- 16 [Community Federal Sav. and Loan Ass'n v. Boyer](#), 710 S.W.2d 332 (Mo. Ct. App. E.D. 1986).
- 17 [Coleman Cattle Co., Inc. v. Carpentier](#), 10 S.W.3d 430 (Tex. App. Beaumont 2000); [Freitag v. McGhie](#), 133 Wash. 2d 816, 947 P.2d 1186 (1997), as amended, (Dec. 18, 1997).
As to a transferor's intent to hinder or delay creditors, see § 9.
- 18 [Bradford v. Bradford](#), 1999 UT App 373, 993 P.2d 887 (Utah Ct. App. 1999).

- 19 [Government Guarantee Fund of Republic of Finland v. Hyatt Corp.](#), 955 F. Supp. 441 (D.V.I. 1997).
As to the necessity and effect of a lack of consideration, see § 26.
- 20 [In re F & C Services, Inc.](#), 44 B.R. 863 (Bankr. S.D. Fla. 1984).
- 21 [Weil v. Long Island Sav. Bank, FSB](#), 77 F. Supp. 2d 313 (E.D. N.Y. 1999) (applying New York law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 2

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

I. In General

§ 2. Types of actionable fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  1

The courts and the statutes recognize different types of actionable fraud—"actual fraud" is sometimes called "fraud in fact" and "constructive fraud," which may also be called "fraud in law."¹ A creditor's bill to reach a debtor's equitable assets, also essentially known as "equitable fraud," has largely been displaced by the state's Uniform Fraudulent Transfer Act.²

Practice Tip:

In some states, whether the creditor is pretransfer or posttransfer will have a bearing on which type of fraud must be shown.³

CUMULATIVE SUPPLEMENT

Cases:

Common-law term "actual fraud" is broad enough to incorporate a fraudulent conveyance. [Husky Intern. Electronics, Inc. v. Ritz](#), 136 S. Ct. 1581 (2016).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Grochocinski v. Schlossberg](#), 402 B.R. 825 (N.D. Ill. 2009) (applying Illinois law); [U.S. v. Toler](#), 666 F. Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law); [In re Eubanks](#), 444 B.R. 415 (Bankr. E.D. Ark. 2010) (applying Arkansas law).
A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with the actual intent to hinder, delay, or defraud any creditor of the debtor. [Unif. Fraudulent Transfer Act § 4\(a\)\(1\)](#).
- 2 [Rahemtulla v. Hassam](#), 539 F. Supp. 2d 755 (M.D. Pa. 2008) (applying Pennsylvania law).
- 3 [Sherry v. Ross](#), 846 F. Supp. 1424 (D. Haw. 1994).
As to the badges of fraud, see §§ 12 to 17.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 3

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

I. In General

§ 3. Cognizable debt requirement

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  54, 62

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 116](#) (Jury instructions—Definition of incurring of obligation)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 127](#) (Jury instructions—Definition of debts in determination of insolvency)

To void a transaction pursuant to a state statute rendering transfers by insolvent transferors void as to creditors, there must be a showing of indebtedness to the creditor at the time of the transaction.¹ In other words, a debtor/creditor relationship is necessary.² The existence of a debt is a requirement for bringing a fraudulent conveyance action,³ and generally speaking, the awareness of probable legal action against a debtor amounts to a "debt."⁴ Thus, an "existing debt" is an existing legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent.⁵ Furthermore, where payments are fixed and obligations are certain, set over a period of time, and subject to judicial enforcement, they are considered "debts" under fraudulent conveyance laws.⁶ Contingent debts are counted in determining "existing debts" for the purposes of ascertaining whether a debtor is insolvent on the ground that the value of the debtor's saleable assets is less than the amount that will be required to pay probable liability on existing debts as they become due.⁷

Under the Uniform Fraudulent Transfer Act, a debt means liability on a claim,⁸ and the definition of a claim includes unknown and unasserted claims; a claim must be an enforceable obligation.⁹

It is not necessary that a "debt," for purposes of fraudulent conveyance law, be reduced to judgment,¹⁰ and in fact, pending lawsuits have been treated as existing debts¹¹ although it has been held that a spouse's continuing obligation of support is not an existing debt.¹² In one jurisdiction, to prevail in an action for a fraudulent conveyance, the conveyor must be a defendant in an action for money damages, or a judgment in such an action must have been docketed against him or her.¹³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Smith v. Porter, 416 B.R. 264 \(E.D. Va. 2009\) \(applying Virginia law\).](#)
- 2 [Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 70 Fed. R. Serv. 3d 1205 \(7th Cir. 2008\) \(applying Illinois law\); Rohm and Haas Co. v. Capuano, 301 F. Supp. 2d 156 \(D.R.I. 2004\) \(applying Rhode Island law\).](#)
- 3 [Jahner v. Jacob, 515 N.W.2d 183 \(N.D. 1994\).](#)
- 4 [U.S. v. Green, 201 F.3d 251 \(3d Cir. 2000\).](#)
- 5 [Baker v. Geist, 457 Pa. 73, 321 A.2d 634 \(1974\).](#)
- 6 [Bank Independent v. Coats, 591 So. 2d 56 \(Ala. 1991\) \(alimony\).](#)
- 7 [In re Fleet, 89 B.R. 420 \(E.D. Pa. 1988\).](#)
- 8 [Referring to a state statute similar to Unif. Fraudulent Transfer Act § 1\(4\).](#)
- 9 [Hullett v. Cousin, 204 Ariz. 292, 63 P.3d 1029 \(2003\).](#)
- 10 [MortgageBanc & Trust, Inc. v. State, 718 S.W.2d 865 \(Tex. App. Austin 1986\).](#)
- 11 [Tri-Continental Leasing Corp., Inc. v. Zimmerman, 485 F. Supp. 495, 30 Fed. R. Serv. 2d 301 \(N.D. Cal. 1980\), overturned due to legislative action Cal.Civil Code 3439.02 \(applying California law\).](#)
- 12 [U.S. v. Mazzara, 530 F. Supp. 1380 \(D.N.J. 1982\), judgment aff'd, 722 F.2d 733 \(3d Cir. 1983\) and judgment aff'd, 722 F.2d 736 \(3d Cir. 1983\).](#)
- 13 [First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 \(E.D. N.Y. 2012\) \(applying New York law\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 4

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

I. In General

§ 4. Uniform Fraudulent Conveyance Act and Uniform Fraudulent Transfer Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  1, 2.1, 5

Under either the Uniform Fraudulent Transfer Act (UFTA) and the Uniform Fraudulent Conveyance Act (UFCA), where adopted, the rules of fraudulent transfers and conveyances have been codified as they existed at the time of the respective Acts' adoption.¹ However, the Uniform Fraudulent Conveyance Act has in fact been revised, modified, and, in certain jurisdictions, repealed by the Uniform Fraudulent Transfer Act.² As to the Uniform Fraudulent Transfer Act, although it provides a broader range of remedies than the common law, the Act is largely an adoption and clarification of the standards of the common law of fraudulent conveyances.³ Indeed, the remedies of the Act and its predecessor are cumulative to the remedies applicable to fraudulent conveyances that existed before the uniform laws went into effect.⁴ However, it has also been held that, to the extent that the facts undergirding an UFTA claim also establish other recognized causes of action, for example, breach of contract, negligence, or common law fraud, a creditor may pursue that claim as well;⁵ not all common law remedies related to fraudulent conveyances are preempted by the Act.⁶

The thrust behind both statutes appears to be that a "fraudulent transfer" occurs when a debtor conveys title to assets to a third person for the purpose of placing the assets beyond the reach of creditors,⁷ and regardless of whether a State has adopted either model law, general equitable principles still apply.⁸ Even where a State has adopted neither uniform law, the purpose of its fraudulent conveyance statutes has been held to be to put the creditors back in the same position they would have enjoyed immediately prior to the voidable conveyance.⁹

The Uniform Fraudulent Transfer Act was designed as a vehicle by which creditors may recover from debtors and others who hinder their collection efforts.¹⁰ Its purpose is to provide creditors with a means to satisfy debts using assets that have been fraudulently transferred,¹¹ specifically, to protect unsecured creditors against debtors who make transfers out of, or make obligations against, the debtor's estate in a manner adverse to the creditors' rights.¹²

As to the Uniform Fraudulent Conveyance Act, one court has held that it seeks to strike a balance between the need to permit transactors to make deals, some good and some not so good, and the need to fix a point beyond which courts will not permit grantors to enter into transactions that will too profoundly impair their ability to discharge obligations to creditors.¹³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [In re Morse Tool, Inc.](#), 148 B.R. 97 (Bankr. D. Mass. 1992).
- 2 [In re S. Rachles, Inc.](#), 131 B.R. 782 (Bankr. D. N.J. 1991).
The Uniform Fraudulent Conveyance Act is to be repealed by states enacting the Uniform Fraudulent Transfer Act. [Unif. Fraudulent Transfer Act § 13](#).
As to the impact of the Bankruptcy Code on the Uniform Fraudulent Conveyance Act and the Uniform Fraudulent Transfer Act, see [Am. Jur. 2d, Bankruptcy](#) §§ 2290, 2291.
- 3 [Certain Underwriters at Lloyd's, London v. Cooperman](#), 289 Conn. 383, 957 A.2d 836 (2008).
- 4 [Wisden v. Superior Court](#), 124 Cal. App. 4th 750, 21 Cal. Rptr. 3d 523 (2d Dist. 2004).
- 5 [Banco Popular North America v. Gandi](#), 184 N.J. 161, 876 A.2d 253 (2005).
- 6 [In re Valente](#), 360 F.3d 256 (1st Cir. 2004) (applying Rhode Island law).
- 7 [Gilchinsky v. National Westminster Bank N.J.](#), 311 N.J. Super. 339, 709 A.2d 1347 (App. Div. 1998), rev'd on other grounds, 159 N.J. 463, 732 A.2d 482 (1999).
- 8 [Spaziano v. Spaziano](#), 122 R.I. 518, 410 A.2d 113 (1980).
- 9 [GATX Corp. v. Addington](#), 2012 WL 1621363 (E.D. Ky. 2012), certificate of appealability denied, (Oct. 15, 2012) (applying Kentucky law).
- 10 [Banco Popular North America v. Gandi](#), 184 N.J. 161, 876 A.2d 253 (2005).
- 11 [Reed v. Reed](#), 277 Neb. 391, 763 N.W.2d 686 (2009).
- 12 [In re Michigan Machine Tool Control Corp.](#), 381 B.R. 657 (Bankr. E.D. Mich. 2008) (applying Michigan law).
- 13 [In re TML, Inc.](#), 291 B.R. 400, 50 U.C.C. Rep. Serv. 2d 511 (Bankr. W.D. Mich. 2003).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 5

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

I. In General

§ 5. General principles of construction of statutes; retroactive effect

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  5, 6

Following the law's policy of discouraging fraud,¹ statutes pertaining to fraudulent conveyances are deemed to be remedial² and beneficial,³ not punitive.⁴ Thus, they are interpreted liberally,⁵ and the courts seek to ascertain and effectuate the intention of the legislature.⁶ Additionally, the courts apply a construction most likely to suppress deceitful practices and to obviate all temptation to commit them.⁷

Proper construction considers statutory "badges of fraud,"⁸ but consideration may also be given to factors other than those listed in a statute.⁹ Although some courts have held that fraudulent conveyance statutes apply retroactively,¹⁰ most do not¹¹ with an exception made for pending cases.¹² Thus, generally, the law in effect when a debtor makes transfers controls the issue of whether the claims are governed by the state's version of the Uniform Fraudulent Conveyance Act or its successor Uniform Fraudulent Transfer Act.¹³ Where adoption of a state's Uniform Fraudulent Transfer Act does not fundamentally alter the nature of fraudulent transfers from the prior Uniform Fraudulent Conveyance Act, state case law interpreting the prior Act is still viable.¹⁴

Observation:

The repeal of a state statute codifying the common law rule against fraudulent conveyances serves to revive the common law rule as to those transfers that could not be challenged under the state's Uniform Fraudulent Transfer Act.¹⁵

Because of the similarity between the Federal Bankruptcy Code and statutes governing fraudulent transfers, the provisions are to be construed consistently with one another,¹⁶ and the findings made under the Code are applicable to actions under similar state statutes.¹⁷ In other words, corollary provisions in the federal and state law that address intentionally fraudulent transfers have been held to receive the same construction and application¹⁸ and may be analyzed contemporaneously.¹⁹ Moreover, the provision of the Uniform Fraudulent Transfer Act governing the uniformity of application and construction requires that the Act be applied and construed in conformity with other states,²⁰ and thus, the interpretation of the courts of other states provides guidance in interpreting the UFTA.²¹

The constructive fraud provisions of the Uniform Fraudulent Transfer Act should be construed and interpreted uniformly with the constructive fraudulent transfer provision of the Bankruptcy Code since consistency between the two statutes was the goal of those who drafted the State Act.²²

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Gornik v. Gornik, 93 Dauph. 390 (Pa. C.P. 1971).
- 2 Macris & Associates, Inc. v. Neways, Inc., 2002 UT App 406, 60 P.3d 1176 (Utah Ct. App. 2002).
- 3 Mullens v. Frazer, 134 W. Va. 409, 59 S.E.2d 694, 24 A.L.R.2d 380 (1950).
- 4 In re Tronox Inc., 464 B.R. 606 (Bankr. S.D. N.Y. 2012) (applying Oklahoma law).
- 5 In re Minnesota Breast Implant Litigation, 36 F. Supp. 2d 863 (D. Minn. 1998) (applying Minnesota law); Macris & Associates, Inc. v. Neways, Inc., 2002 UT App 406, 60 P.3d 1176 (Utah Ct. App. 2002).
- 6 In re Butler, 552 N.W.2d 226 (Minn. 1996).
- 7 Lucas v. Coker, 1941 OK 154, 189 Okla. 95, 113 P.2d 589 (1941).
- 8 In re Larson, 245 B.R. 609 (Bankr. D. Minn. 2000).
As to badges of fraud, see §§ 12 to 17.
- 9 In re Miller, 188 B.R. 302 (Bankr. M.D. Fla. 1995) (applying Florida law).
- 10 Cannon v. Whitman Corp., 212 Ill. App. 3d 79, 155 Ill. Dec. 503, 569 N.E.2d 1114 (5th Dist. 1991).
- 11 Federal Refinance Co., Inc. v. Klock, 352 F.3d 16 (1st Cir. 2003) (applying Massachusetts law); Stanko v. C.I.R., 209 F.3d 1082 (8th Cir. 2000) (construing Nebraska statute); U.S. v. LaBine, 73 F. Supp. 2d 853 (N.D. Ohio 1999) (applying Ohio law).
- 12 Profeta v. Lombardo, 75 Ohio App. 3d 621, 600 N.E.2d 360 (11th Dist. Lake County 1991).
- 13 In re Simpson, 334 B.R. 298 (Bankr. D. Mass. 2005) (applying Massachusetts law).
- 14 In re Michigan Machine Tool Control Corp., 381 B.R. 657 (Bankr. E.D. Mich. 2008) (applying Michigan law).
- 15 In re Galbreath, 475 B.R. 749 (Bankr. S.D. Ga. 2003) (applying Georgia law).
- 16 In re Dolata, 306 B.R. 97 (Bankr. W.D. Pa. 2004) (applying Pennsylvania law).
- 17 U.S. v. Rocky Mountain Holdings, Inc., 782 F. Supp. 2d 106 (E.D. Pa. 2011) (applying Pennsylvania law); In re Gluth Bros. Const., Inc., 424 B.R. 368 (Bankr. N.D. Ill. 2009) (applying Illinois law).
- 18 In re Polaroid Corp., 472 B.R. 22 (Bankr. D. Minn. 2012) (referring to Eighth Circuit law); In re Tiger Petroleum Co., 319 B.R. 225 (Bankr. N.D. Okla. 2004) (applying Oklahoma law).
- 19 In re 3dfx Interactive, Inc., 389 B.R. 842 (Bankr. N.D. Cal. 2008) (applying California law).
- 20 Dominguez v. Eppley Transp. Services, Inc., 277 Neb. 531, 763 N.W.2d 696 (2009).

- 21 [Thompson v. Hanson](#), 142 Wash. App. 53, 174 P.3d 120 (Div. 1 2007), [aff'd](#), 168 Wash. 2d 738, 239 P.3d 537 (2009).
- 22 [Fidelity Bond and Mortg. Co. v. Brand](#), 371 B.R. 708 (E.D. Pa. 2007) (applying Pennsylvania law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers II A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#) 🔑8

A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, Fraudulent Conveyances 🔑8

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 6

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

A. In General

§ 6. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#) 8

The determination as to whether a fraudulent conveyance has occurred is made on a case-by-case basis,¹ based on the facts and circumstances of each case,² and depends on conditions that existed when it was made³ as there is no precise formula for determining whether a transaction was a fraudulent conveyance.⁴ In addition to considering the facts and circumstances,⁵ it also considers other elements and factors, such as choice of law,⁶ as well as whether there was a creditor, either present or future,⁷ to whom a debt was owed⁸ and who was defrauded concomitant with a debtor intending fraud.⁹ Additionally, a court may consider whether there was a conveyance of property that could have been applied to the payment of the debt,¹⁰ whether the plaintiff or the creditor sustained damages caused by the alleged fraudulent transfer,¹¹ and whether the transfer was made in haste.¹²

Observation:

The time of the conveyance is the relevant time for determining if the debtor has made a fraudulent conveyance.¹³ In some states, depending upon whether the creditor is pretransfer or posttransfer will have a bearing on which type of fraud must be shown—in the case of pretransfer creditors, the creditor need only show badges of fraud to establish an inference of fraud whereas posttransfer creditors must show fraud in fact or an actual intent to defraud.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Common-law fraudulent conveyances, although a "fraud," do not require a misrepresentation from a debtor to a creditor. [Husky Intern. Electronics, Inc. v. Ritz](#), 136 S. Ct. 1581 (2016).

Conveyance which hinders, delays, or defrauds creditors shall be void as against the recipient unless that party received it in good faith and for consideration. [Husky Intern. Electronics, Inc. v. Ritz](#), 136 S. Ct. 1581 (2016).

Conveyance which hinders, delays, or defrauds creditors shall be void as against the recipient unless that party received it in good faith and for consideration. [Husky Intern. Electronics, Inc. v. Ritz](#), 136 S. Ct. 1581 (2016).

Pursuant to the Uniform Fraudulent Transfer Act (UFTA), the creditor is to demonstrate that: (1) there was a creditor to be defrauded; (2) a debtor intending fraud; and (3) a conveyance of property which could have been applicable to the payment of the debt due. [West's F.S.A. § 726.105](#). [Wiand v. Lee](#), 753 F.3d 1194 (11th Cir. 2014).

Same elements will suffice to satisfy the requirements of the constructive fraudulent transfer provisions of the Bankruptcy Code and of Pennsylvania's fraudulent transfer statute. 11 U.S.C.A. § 548(a)(1)(B); 12 Pa.C.S.A. § 5105. [In re Dressel Associates, Inc.](#), 536 B.R. 158 (W.D. Pa. 2015).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Jecker v. Hidden Valley, Inc.](#), 422 N.J. Super. 155, 27 A.3d 964 (App. Div. 2011), certification denied, 210 N.J. 28, 40 A.3d 58 (2012).
- 2 [In re Webb Mtn, LLC](#), 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law).
- 3 [Boyer v. Crown Stock Distribution, Inc.](#), 587 F.3d 787 (7th Cir. 2009) (applying Indiana law).
- 4 [Lee's Ready Mix and Trucking, Inc. v. Creech](#), 660 N.E.2d 1033 (Ind. Ct. App. 1996).
- 5 [U.S. v. Schaeffer](#), 245 B.R. 407 (D. Colo. 1999) (applying Colorado law).
Conveyances must be evaluated in context, and where the transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications. [In re CNB Intern., Inc.](#), 440 B.R. 31 (W.D. N.Y. 2010).
- 6 [S.E.C. v. Infinity Group Co.](#), 27 F. Supp. 2d 559 (E.D. Pa. 1998); [Roxas v. Marcos](#), 89 Haw. 91, 969 P.2d 1209 (1998).
- 7 [U.S. v. LaBine](#), 73 F. Supp. 2d 853 (N.D. Ohio 1999) (applying Ohio law).
- 8 [Marble Bank v. Heaton](#), 160 Vt. 188, 624 A.2d 365 (1993).
- 9 [In re Young](#), 235 B.R. 666 (Bankr. M.D. Fla. 1999) (applying Florida law).
As to mutual fraudulent intent, see § 8.
- 10 [Huntsman Packaging Corp. v. Kerry Packaging Corp.](#), 992 F. Supp. 1439 (M.D. Fla. 1998), *aff'd*, 172 F.3d 882 (11th Cir. 1999).
- 11 [Broxmeyer v. Elie](#), 647 So. 2d 893 (Fla. 4th DCA 1994).
- 12 [In re El Mundo Corp.](#), 208 B.R. 781 (D.P.R. 1997) (applying Puerto Rican law).
- 13 [Freeland v. Enodis Corp.](#), 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); [In re Krause](#), 386 B.R. 785 (Bankr. D. Kan. 2008), decision *aff'd*, Bankr. L. Rep. (CCH) P 81734, 2010-1 U.S. Tax Cas. (CCH) P

50222, 105 A.F.T.R.2d 2010-731, 2009 WL 5064348 (D. Kan. 2009), *aff'd*, 637 F.3d 1160 (10th Cir. 2011) (applying Kansas law).
Sherry v. Ross, 846 F. Supp. 1424 (D. Haw. 1994).

14

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 7

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

A. In General

§ 7. Constructive fraud; fraud in law

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#) 8

A.L.R. Library

[Assumption of Mortgage on Real Property as Consideration for Conveyance That Is Attacked as Fraudulent, 15 A.L.R.6th 241](#)

Trial Strategy

[Avoidance and Recovery of Fraudulent Transfers, 25 Am. Jur. Proof of Facts 3d 591](#)
[Conveyance With Intent to Defraud Creditors, 5 Am. Jur. Proof of Facts 2d 697](#)

Unlike actual fraud, constructive fraud is essentially unconcerned with intent and instead focuses upon economic effect and involves an analysis of objective factors.¹ "Constructive fraud" thus constitutes legal fraud irrespective of actual intent.² For a constructive fraud claim under a state's version of the Uniform Fraudulent Conveyance Act, a plaintiff must allege that there is a conveyance without fair consideration³ or alternatively that the transferee received less than reasonably equivalent value for the exchange at issue⁴ and that (1) the transferor was insolvent at the time of the conveyance or will be rendered insolvent by the transfer in question; or, (2) as a result of the transfer in question, the transferor is left with unreasonably small capital

to conduct its business; or, (3) as a result of the transfer in question, the transferor intends or believes that it will incur debt beyond its ability to pay.⁵ A finding of constructive fraud pursuant to debtor and creditor law may be predicated upon proof of insolvency and lack of fair consideration without a showing of actual motive or intent to defraud.⁶ To avoid a fraudulent transfer, the plaintiff must show that (1) there was a transfer, (2) for less than a reasonably equivalent value, and (3) the debtor was insolvent.⁷ "Constructive fraud" has also been said to occur when: (1) a voluntary gift is made; (2) there is an existing or contemplated indebtedness against the debtor; and (3) the debtor has failed to retain sufficient property to pay the indebtedness.⁸ However, it has also been held that under the Uniform Fraudulent Transfer Act, there is no requirement that the transfer be voluntary.⁹ To prevail on a claim of "constructive fraud" under another state's Uniform Fraudulent Transfers Act, a bankruptcy trustee is required to show that the debtor received less than reasonably equivalent value in exchange for the transfer made to the defendants and that the debtor either: (1) was about to engage in a business transaction for which the debtor had insufficient assets in relation to the transaction or (2) intended to incur or reasonably should have believed that he or she would incur debts beyond his or her ability to pay.¹⁰ Another court has ruled that a creditor will succeed under a constructive fraud theory if the creditor shows, one, that the transferor was indebted to the creditor at the time of the transfer; two, that the conveyance was voluntary; and, three, that the grantor failed to retain sufficient property to pay his or her indebtedness to the creditor in full, not merely at the time of transfer but also in the final analysis when the creditor seeks to collect the debt.¹¹

A transfer made or obligation incurred by a debtor is fraudulent as to the creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation through either actual fraud or constructive fraud.¹²

The prohibition of constructive fraud operates to avoid transfers motivated by generosity, rather than fraud, reflecting the policy that an insolvent entity or a person should be just to his or her creditors before being generous to others.¹³

CUMULATIVE SUPPLEMENT

Cases:

Under Florida's Uniform Fraudulent Transfer Act (FUFTA), a transfer is fraudulent under a theory of constructive fraud if the transferor does not receive reasonable value in exchange and the transferor either (1) was engaged or was about to engage in a business or a transaction for which the remaining assets of the transferor were unreasonably small in relation to the business or transaction; (2) intended to, believed, or reasonably should have believed that he or she would incur debts beyond his or her ability to pay them as they became due; or (3) was insolvent at the time of the transfer. [West's F.S.A. §§ 726.105\(1\)\(b\)\(1\), 726.106\(1\)](#). [Wiand v. Morgan](#), 919 F. Supp. 2d 1342 (M.D. Fla. 2013).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [In re Felt Mfg. Co., Inc.](#), 371 B.R. 589, 2007 BNH 27 (Bankr. D. N.H. 2007) (applying New Hampshire law).
- 2 [Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC](#), 842 F. Supp. 2d 661 (S.D. N.Y. 2012) (applying New York law); [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).
- 3 [Drenis v. Haligiannis](#), 452 F. Supp. 2d 418 (S.D. N.Y. 2006) (applying New York law).
- 4 [In re Xyan.Com, Inc.](#), 299 B.R. 357 (Bankr. E.D. Pa. 2003) (applying Pennsylvania law).

- 5 Drenis v. Haligiannis, 452 F. Supp. 2d 418 (S.D. N.Y. 2006) (applying New York law); In re Xyan.Com, Inc., 299 B.R. 357 (Bankr. E.D. Pa. 2003) (applying Pennsylvania law).
- 6 Zanani v. Meisels, 78 A.D.3d 823, 910 N.Y.S.2d 533 (2d Dep't 2010).
- 7 In re American Business Financial Services, Inc., 471 B.R. 354 (Bankr. D. Del. 2012) (applying Delaware law).
- 8 Wachovia Securities, LLC v. Neuhauser, 528 F. Supp. 2d 834 (N.D. Ill. 2007) (applying Illinois law); Apollo Real Estate Investment Fund, IV, L.P. v. Gelber, 403 Ill. App. 3d 179, 343 Ill. Dec. 735, 935 N.E.2d 963 (1st Dist. 2010), appeal denied, 238 Ill. 2d 647, 347 Ill. Dec. 249, 942 N.E.2d 452 (2010).
- 9 In re Canopy Financial, Inc., 477 B.R. 696 (N.D. Ill. 2012) (applying Illinois law).
- 10 In re Michigan Machine Tool Control Corp., 381 B.R. 657 (Bankr. E.D. Mich. 2008) (applying Michigan law).
- 11 In re Derivium Capital, LLC, 380 B.R. 407 (Bankr. D. S.C. 2006) (applying South Carolina law).
As to the debtor's failure to withhold sufficient property to pay debts, see § 17.
- 12 In re Energy Smart, Inc., 381 B.R. 359 (Bankr. M.D. Fla. 2007) (applying Florida law).
- 13 CB Richard Ellis, Inc. v. CLGP, LLC, 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers II B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

B. Fraudulent Intent; Knowledge; Notice

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  9, 11, 155, 156, 158(.5), 162, 282, 295.2, 298(.5), 308(1)

A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  9, 11, 155, 156, 158(.5), 162, 282, 295.2, 298(.5), 308(1)

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 8

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

B. Fraudulent Intent; Knowledge; Notice

§ 8. Generally; mutual fraudulent intent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  9, 282

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 130](#) (Jury instructions—Mutual fraudulent intent by parties to transaction)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 131](#) (Jury instructions—Intent to defraud specific creditor)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 132 to 134](#) (Jury instructions—Transferee's knowledge of fraudulent intent)

As far as fraudulent conveyances are concerned, the debtor-transferor's intent¹ or state of mind is the focus, or point of inquiry,² and malice, insolvency,³ and motive are irrelevant.⁴

Caution:

In the constructive fraud context, no finding with regard to the state of mind of the transferor is necessary.⁵

However, according to some courts, intent on part of the transferor is not enough. There must be a corresponding intent on the part of the transferee,⁶ alternatively formulated as an intent participated in by the transferee or grantee⁷ or an intent imputable to the grantee.⁸ According to these courts, the transferee's notice of the transferor's fraudulent intent must be alleged,⁹ and where the transferee purchases property for a fair consideration and with no knowledge of the transferor's fraudulent intent, the conveyance may not be set aside.¹⁰ Other courts have stated that a transferee's intent is irrelevant in finding a fraudulent conveyance¹¹ and that whether transferees knowingly participated in that fraud is irrelevant for purposes of establishing the premise of, as opposed to liability for, a fraudulent transfer.¹²

Practice Tip:

The plaintiff must establish the actual fraudulent intent of the transferor and need not plead the actual fraudulent intent of the transferee.¹³ The intent of the transferee only becomes relevant as an affirmative defense if the defendant is not the initial transferee.¹⁴

However, it is not necessary to prove that the grantee had positive knowledge of the grantor's fraudulent intent; it is sufficient to prove that the grantee had knowledge of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of persons of ordinary care and prudence, and which would naturally prompt him or her to pause and inquire before consummating the transaction, and to prove that such inquiry would have necessarily led to a discovery of the facts from which the law imputes fraud to the grantor.¹⁵

Observation:

In order to determine a debtor's actual intent, the Uniform Fraudulent Transfer Act, adopted by numerous states, provides that consideration may be given, among other factors, to whether:¹⁶

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;

- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

This list is nonexclusive, and the courts may consider other factors in determining the debtor's intent.¹⁷ These factors do not create a mathematical formula to establish actual intent, and there is no minimum number of factors that must be present before the scales tip in favor of a finding of actual intent to defraud.¹⁸

Still, other courts recognize "fraud in fact" which is a conveyance where a party must prove that the transfers were made with the actual intent to hinder, delay, or defraud the creditors.¹⁹ Similarly, courts have permitted creditors to move under a theory of "intentional fraud" which also requires a showing of intent.²⁰ Under an "intentional fraud" provision, actual intent to hinder, delay, or defraud need not be proven by direct evidence but may be inferred where a conveyance is made without fair consideration.²¹

Observation:

Proof of fraud is not an aspect of a fraudulent transfer claim.²²

CUMULATIVE SUPPLEMENT

Cases:

Genuine issues of material fact existed as to whether transfer of assets from Postal Service customer to transferee was actually or constructively fraudulent under federal law, Pennsylvania law and/or District of Columbia law, whether the transfer to transferee was to an "insider," whether customer retained possession or control of the property, whether the transfer was of substantially all the transferee's assets, and whether customer was insolvent, precluding summary judgment in favor of transferee and the corporation which held a controlling interest in transferee, or in favor of Postal Service on its claim to recover deficiency assessed against customer based on fraudulent transfer theory. 28 U.S.C.A. § 3304; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.;

12 Pa.C.S.A. § 5104(a); D.C. Official Code, 2001 Ed. § 28–3104. *Reese Bros., Inc. v. U.S. Postal Service*, 905 F. Supp. 2d 223 (D.D.C. 2012).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 *S.E.C. v. Resource Development Intern., LLC*, 487 F.3d 295 (5th Cir. 2007) (applying Texas law); *In re Appleseed's Intermediate Holdings, LLC*, 470 B.R. 289 (D. Del. 2012) (applying Delaware law); *In re Jacobs*, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law).
- 2 *CB Richard Ellis, Inc. v. CLGP, LLC*, 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011); *Glimcher Supermall Venture, LLC v. Coleman Co.*, 2007 SD 98, 739 N.W.2d 815 (S.D. 2007); *Cadle Co. v. Wilson*, 136 S.W.3d 345 (Tex. App. Austin 2004).
Inquiry as to whether transfer was made with intent to hinder, delay, or defraud creditors goes to a subjective state of mind on the part of the grantor-transferor. *In re Polaroid Corp.*, 472 B.R. 22 (Bankr. D. Minn. 2012) (applying Minnesota law).
- 3 *CB Richard Ellis, Inc. v. CLGP, LLC*, 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).
- 4 *Comer v. Calim*, 128 Ohio App. 3d 599, 716 N.E.2d 245 (1st Dist. Hamilton County 1998).
- 5 *In re Eubanks*, 444 B.R. 415 (Bankr. E.D. Ark. 2010) (applying Arkansas law).
- 6 *In re Kovler*, 249 B.R. 238 (Bankr. S.D. N.Y. 2000), opinion supplemented on other grounds, 253 B.R. 592 (Bankr. S.D. N.Y. 2000) and corrected, 329 B.R. 17 (Bankr. S.D. N.Y. 2005) (applying New York law).
- 7 *In re Fabian*, 458 B.R. 235 (Bankr. D. Md. 2011), aff'd, 475 B.R. 463 (D. Md. 2012) (applying Maryland law); *Abbott Terrace Health Center, Inc. v. Parawich*, 120 Conn. App. 78, 990 A.2d 1267 (2010).
- 8 *In re Amelung*, 436 B.R. 806 (Bankr. D. S.C. 2010) (applying South Carolina law).
- 9 *In re Taneja*, 453 B.R. 618 (Bankr. E.D. Va. 2011) (applying Virginia law).
- 10 *Motorola, Inc. v. Abeckaser*, 2010 WL 415290 (E.D. N.Y. 2010) (applying New York law).
- 11 *In re Appleseed's Intermediate Holdings, LLC*, 470 B.R. 289 (D. Del. 2012) (applying Delaware law).
- 12 *S.E.C. v. Resource Development Intern., LLC*, 487 F.3d 295 (5th Cir. 2007) (applying Texas law).
- 13 *In re Dreier LLP*, 452 B.R. 451 (Bankr. S.D. N.Y. 2011) (applying New York law).
- 14 *In re Jacobs*, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law).
- 15 *Fox Rest Associates, L.P. v. Little*, 282 Va. 277, 717 S.E.2d 126 (2011).
- 16 *Unif. Fraudulent Transfer Act* § 4(b).
The Uniform Fraudulent Conveyance Act, which is applicable in some states, merely provides that every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors. *Unif. Fraudulent Conveyance Act* § 7.
As to these considerations, see generally, §§ 8 to 11.
- 17 *In re Jennings*, 332 B.R. 465 (Bankr. M.D. Fla. 2005), order aff'd, 2006 WL 6829886 (M.D. Fla. 2006) (applying Florida law); *Hahn v. Love*, 321 S.W.3d 517 (Tex. App. Houston 1st Dist. 2009).
- 18 *In re Beverly*, 374 B.R. 221 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008) (applying California law); *Klinker v. First Merchants Bank, N.A.*, 964 N.E.2d 190 (Ind. 2012).
- 19 *In re Gluth Bros. Const., Inc.*, 424 B.R. 368 (Bankr. N.D. Ill. 2009) (applying Illinois law); *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 343 Ill. Dec. 735, 935 N.E.2d 963 (1st Dist. 2010), appeal denied, 238 Ill. 2d 647, 347 Ill. Dec. 249, 942 N.E.2d 452 (2010).
- 20 *In re Janz*, 140 B.R. 256 (Bankr. D. N.D. 1991), subsequently aff'd, 980 F.2d 734 (8th Cir. 1992).
- 21 *In re Cassandra Group*, 338 B.R. 583 (Bankr. S.D. N.Y. 2006) (applying New York law).
- 22 *U.S. Bank Nat. Ass'n v. Verizon Communications Inc.*, 479 B.R. 405 (N.D. Tex. 2012).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 9

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

B. Fraudulent Intent; Knowledge; Notice

§ 9. Intent to hinder or delay creditors

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  11

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 129](#) (Jury instructions—Actual intent to delay, hinder, or defraud)

Proof of an intent to hinder or delay creditors is sufficient to establish a fraudulent transfer claim.¹ The courts may consider badges of fraud² in deciding whether assets were converted with the requisite fraudulent intent and may take into account the particular facts surrounding the challenged conveyance as well.³

Observation:

A debtor's intent to defraud clients when misappropriating funds is not an intent to defraud the debtor's creditors as required to avoid transfers as actually fraudulent as to creditors.⁴

The existence of a debtor's intent to hinder, delay, or defraud either present or future creditors, which is sometimes referred to as "fraud in fact,"⁵ permits a court to set aside a conveyance made with such intent⁶ regardless of whether a fair consideration has been paid⁷ and even though the debtor was solvent at the time of the transfer.⁸ The intent must have existed at the time the transfer was made.⁹ Thus, in order to set a transfer aside as having been made with an actual intent to hinder, delay, or defraud creditors, one court has stated that the plaintiff must establish:

- (1) that the thing transferred has value, out of which the creditor could have realized a portion of its claim;
- (2) that this thing was transferred or disposed of by the debtor; and
- (3) that the transfer was done with actual intent to defraud.¹⁰

Other courts have characterized these requirements as (1) that the transfer was made by the transferor with the actual intent of defrauding creditors, (2) that the transferor was indebted at the time of the transfer, and (3) that the transferor's intent is either imputable to the transferee, or the transferee had knowledge of the fraud at the time of the purchase or transfer.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Loan repayments to lender from separate company affiliated with operator of Ponzi scheme were not made with fraudulent intent, as required for claim under Minnesota Uniform Fraudulent Transfer Act (MUFTA), since legitimate business transactions were financed with capital from lender, loans were repaid through proceeds of "real life" transactions, and proceeds of loans were not diverted to Ponzi scheme being perpetrated by operator. [11 U.S.C.A. § 544. *Stoebner v. Opportunity Finance, LLC*, 909 F.3d 219 \(8th Cir. 2018\).](#)

Under the Florida Uniform Fraudulent Transfer Act (FUFTA), transfer by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor. [West's F.S.A. § 726.105\(1\)\(a\). *TempPay, Inc. v. Biltres Staffing of Tampa Bay, LLC*, 945 F. Supp. 2d 1331 \(M.D. Fla. 2013\).](#)

In determining a debtor's actual intent in making a transfer of assets and whether it was to "hinder, delay, or defraud any creditor of the debtor," Florida's Uniform Fraudulent Transfer Act (UFTA) looks to indicia of intent commonly known as badges of fraud. [West's F.S.A. § 726.105\(1\)\(a\), \(2\)\(a-k\). *National Maritime Services, Inc. v. Straub*, 979 F. Supp. 2d 1322 \(S.D. Fla. 2013\).](#)

Chapter 13 debtor's prepetition grant of security interest to individual creditor, in the form of a note and deed of trust, was done with intent to hinder and delay assertion of a secured claim by corporate creditor, and so was avoidable on the basis of actual fraud under the California Uniform Fraudulent Transfer Act (UFTA); individual creditor discovered that debtor, a bookkeeper, had fraudulently obtained funds from several clients, including himself and corporate creditor, debtor was able to reach settlement agreements with some of her clients but not with corporate creditor, which filed a state-court lawsuit against her, through individual creditor's sympathy for debtor a special relationship was continued or created between them, debtor preferred that individual creditor receive any available money before corporate creditor, and as her former clients researched

their claims, debtor faced a growing and unmanageable insolvency. 11 U.S.C.A. § 544; Cal. Civ. Code § 3439.04(a)(1). In re Martinez, 610 B.R. 290 (Bankr. N.D. Cal. 2019).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC, 842 F. Supp. 2d 661 (S.D. N.Y. 2012) (applying New York law); In re Pace, 456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law); Apollo Real Estate Investment Fund, IV, L.P. v. Gelber, 403 Ill. App. 3d 179, 343 Ill. Dec. 735, 935 N.E.2d 963 (1st Dist. 2010), appeal denied, 238 Ill. 2d 647, 347 Ill. Dec. 249, 942 N.E.2d 452 (2010).
- 2 §§ 12 to 17.
- 3 In re Jennings, 332 B.R. 465 (Bankr. M.D. Fla. 2005), order aff'd, 2006 WL 6829886 (M.D. Fla. 2006) (applying Florida law); In re Lexington Oil and Gas Ltd., Co., 423 B.R. 353 (Bankr. E.D. Okla. 2010) (applying Oklahoma law).
- 4 In re Kennedy, 279 B.R. 455 (Bankr. D. Conn. 2002) (applying Connecticut law).
- 5 In re Spatz, 222 B.R. 157 (N.D. Ill. 1998) (applying Illinois law).
- 6 Arvest Bank v. Byrd, 814 F. Supp. 2d 775 (W.D. Tenn. 2011) (applying Tennessee law); In re Jacobs, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law); Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. Ct. App. E.D. 2010), reh'g and/or transfer denied, (June 8, 2010); Clayton v. Wilson, 168 Wash. 2d 57, 227 P.3d 278 (2010).
- 7 Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC, 842 F. Supp. 2d 661 (S.D. N.Y. 2012) (applying New York law).
Generally, as to the effect of a lack of consideration in determining the character of a conveyance, see § 26.
- 8 In re Sharp Intern. Corp., 302 B.R. 760 (E.D. N.Y. 2003), aff'd, 403 F.3d 43 (2d Cir. 2005) (applying New York law).
Generally, as to the importance of solvency or insolvency in determining the character of a conveyance, see §§ 18 to 24.
- 9 Neubauer v. Cloutier, 265 Minn. 539, 122 N.W.2d 623 (1963).
- 10 In re Monahan Ford Corp. of Flushing, 340 B.R. 1 (Bankr. E.D. N.Y. 2006) (applying New York law).
- 11 In re Derivium Capital, LLC, 380 B.R. 407 (Bankr. D. S.C. 2006) (applying South Carolina law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 10

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

B. Fraudulent Intent; Knowledge; Notice

§ 10. Character and proof of intent or knowledge

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  9, 295.2, 298(.5), 308(1)

Fraudulent intent, which can be characterized as deception intentionally practiced to frustrate the legal rights of another,¹ is a question of fact.² It is determined by the facts and circumstances of each case,³ and proof of intent must be made by clear and convincing evidence.⁴ However, direct evidence of fraud is not essential,⁵ and a finding of fraudulent intent may be arrived at by way of inference or presumption⁶ though proof of the fraudulent intent must exist at the time of the transfer, not subsequent to it.⁷ Furthermore, it is not necessary that the debtor have exhibited intent as to the specific creditor bringing the fraudulent transfer claim.⁸

In proving intent, an evil motive is not required,⁹ and the courts recognize that conveyances can be "actually fraudulent" if made with actual intent as distinguished from intent which is presumed in law.¹⁰ The courts also recognize that fraudulent intent is rarely susceptible to direct evidence, and thus, it may be gleaned from the circumstances surrounding the alleged fraudulent transaction.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Intent to hinder, delay or defraud, of kind required under California law in order to avoid transfer as actually fraudulent to creditors, may be established inferentially from the surrounding circumstances. [Cal. Civ. Code § 3439.04\(b\)](#). [In re Ezra](#), 537 B.R. 924 (B.A.P. 9th Cir. 2015).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Southern Industries, Inc. v. Jeremias, 66 A.D.2d 178, 411 N.Y.S.2d 945 (2d Dep't 1978).
- 2 In re Still, 393 B.R. 896 (Bankr. C.D. Cal. 2008) (applying California law); Filip v. Bucurenciu, 129 Cal. App. 4th 825, 28 Cal. Rptr. 3d 884 (3d Dist. 2005); Hoesman v. Sheffler, 886 N.E.2d 622 (Ind. Ct. App. 2008); Doyle v. Kontemporary Builders, Inc., 370 S.W.3d 448 (Tex. App. Dallas 2012), reh'g overruled, (June 6, 2012) and review denied, (Oct. 19, 2012).
- 3 In re Jackson, 318 B.R. 5, 2004 BNH 26 (Bankr. D. N.H. 2004), subsequently aff'd, 459 F.3d 117 (1st Cir. 2006) (applying New Hampshire law); In re Cassandra Group, 312 B.R. 491 (Bankr. S.D. N.Y. 2004) (applying New York law); Sunbelt Environmental Services, Inc. v. Rieder's Jiffy Market, Inc., 138 S.W.3d 130 (Mo. Ct. App. S.D. 2004); Blood v. Nofzinger, 162 Ohio App. 3d 545, 2005-Ohio-3859, 834 N.E.2d 358 (6th Dist. Huron County 2005); Doyle v. Kontemporary Builders, Inc., 370 S.W.3d 448 (Tex. App. Dallas 2012), reh'g overruled, (June 6, 2012) and review denied, (Oct. 19, 2012).
- 4 Wachovia Securities, LLC v. Banco Panamericano, Inc., 674 F.3d 743 (7th Cir. 2012) (applying Illinois law); First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law); Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. Ct. App. E.D. 2010), reh'g and/or transfer denied, (June 8, 2010); U.S. Bancorp Equipment Finance, Inc. v. Rubashkin, 98 A.D.3d 1057, 950 N.Y.S.2d 767 (2d Dep't 2012); Fox Rest Associates, L.P. v. Little, 282 Va. 277, 717 S.E.2d 126 (2011).
- 5 Blood v. Nofzinger, 162 Ohio App. 3d 545, 2005-Ohio-3859, 834 N.E.2d 358 (6th Dist. Huron County 2005).
- 6 Warfield v. Alaniz, 453 F. Supp. 2d 1118 (D. Ariz. 2006), aff'd, 569 F.3d 1015 (9th Cir. 2009) (applying Arizona law); Amusement Industry, Inc. v. Midland Avenue Associates, LLC, 820 F. Supp. 2d 510 (S.D. N.Y. 2011) (applying New York law); In re Still, 393 B.R. 896 (Bankr. C.D. Cal. 2008) (applying California law); Filip v. Bucurenciu, 129 Cal. App. 4th 825, 28 Cal. Rptr. 3d 884 (3d Dist. 2005).
- 7 Palmer v. Murphy, 42 Mass. App. Ct. 334, 677 N.E.2d 247 (1997).
- 8 Tiab Communications Corp. v. Keymarket of Nepa, Inc., 263 F. Supp. 2d 925 (M.D. Pa. 2003) (applying Pennsylvania law); In re Ducate, 355 B.R. 536 (Bankr. D. S.C. 2006) (applying South Carolina law).
- 9 Aristocrat Lakewood Nursing Home v. Mayne, 133 Ohio App. 3d 651, 729 N.E.2d 768 (8th Dist. Cuyahoga County 1999).
- 10 Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC, 842 F. Supp. 2d 661 (S.D. N.Y. 2012) (applying New York law).
- 11 U.S. v. Porath, 764 F. Supp. 2d 883 (E.D. Mich. 2011), aff'd, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); Amusement Industry, Inc. v. Midland Avenue Associates, LLC, 820 F. Supp. 2d 510 (S.D. N.Y. 2011) (applying New York law); Arvest Bank v. Byrd, 814 F. Supp. 2d 775 (W.D. Tenn. 2011) (applying Tennessee law); In re Polaroid Corp., 472 B.R. 22 (Bankr. D. Minn. 2012) (applying Minnesota law); Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. Ct. App. E.D. 2010), reh'g and/or transfer denied, (June 8, 2010); Fox Rest Associates, L.P. v. Little, 282 Va. 277, 717 S.E.2d 126 (2011).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 11

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

B. Fraudulent Intent; Knowledge; Notice

§ 11. Character and proof of intent or knowledge—Transferee's participation or knowledge; circumstances putting transferee on notice

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  9, 11, 155, 156, 158(.5), 162

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 46](#) (Complaint—Allegation—Participation in fraud—By transferee)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 134](#) (Jury instructions—Transferee's knowledge of fraudulent intent—As precluding bona fide purchaser status)

The relevant inquiry as to the transferee in an allegedly fraudulent conveyance is whether the transferee knew of the transferor's intent to defraud his or her creditors in any way. The transferee need not have actual knowledge of the scheme that renders a conveyance fraudulent; constructive knowledge of the scheme to defraud will also suffice.¹ The transferee's intent may thus be established by constructive or actual knowledge of the fraudulent scheme on the part of the transferee.² The test is whether the transferee had notice or constructive knowledge of facts or circumstances which would induce an ordinarily prudent person to make inquiry as to the purpose of the transfer³ and whether the inquiry, if made with reasonable diligence, would have led to the discovery of the debtor's fraudulent purpose⁴ or facts from which the law imputes fraud to the grantor.⁵

Fraudulent transfers are not void against bona fide transferees without knowledge of fraudulent intent.⁶ The fraudulent transfer statute protects the transferee for value only if the transferee is unaware of the transferor's fraudulent intent, in which case the

statute does not affect the title of the purchaser for valuable consideration.⁷ It is not necessary to prove that a transferee is an insider in order to prove the transferee's knowledge of the transferor's fraudulent intent.⁸ Because a good-faith defense requires the fact finder to determine whether the investor had sufficient knowledge to place him or her on inquiry notice of the voidability of the transfer, the courts typically assess whether the investors ignored red flags revealing the true nature of the challenged investment.⁹ Inquiry into whether the transferee acted in "good faith" focuses on the transferee's knowledge of the transferor's fraudulent intent; "good faith" is lacking where the transferee knew, or should have known, that the transferor was not trading normally but that the purpose of the trade, so far as the transferor was concerned, was defrauding creditors.¹⁰

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [In re Actrade Financial Technologies Ltd.](#), 337 B.R. 791 (Bankr. S.D. N.Y. 2005) (applying New York law).
- 2 [Snodgrass v. Baumgart](#), 25 Kan. App. 2d 812, 974 P.2d 604 (1999).
- 3 [In re Seminole Walls & Ceilings Corp.](#), 446 B.R. 572 (Bankr. M.D. Fla. 2011) (applying Florida law); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 4 [In re Seminole Walls & Ceilings Corp.](#), 446 B.R. 572 (Bankr. M.D. Fla. 2011) (applying Florida law).
- 5 [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 6 [Balzer and Associates, Inc. v. The Lakes on 360, Inc.](#), 250 Va. 527, 463 S.E.2d 453 (1995).
- 7 [In re Tarangelo](#), 378 B.R. 128 (Bankr. E.D. Va. 2007) (applying Virginia law).
- 8 [Hahn v. Love](#), 321 S.W.3d 517 (Tex. App. Houston 1st Dist. 2009).
- 9 [Hecht v. Malvern Preparatory School](#), 716 F. Supp. 2d 395 (E.D. Pa. 2010) (applying Pennsylvania law).
- 10 [In re Dreier LLP](#), 462 B.R. 474 (Bankr. S.D. N.Y. 2011) (applying New York law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers II C Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

C. Indicia or Badges of Fraud

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  8 to 10, 14 to 16, 66, 162.1

A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  8 to 10, 14 to 16, 66, 162.1

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 12

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

C. Indicia or Badges of Fraud

§ 12. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  14

Certain circumstances relating to defrauding creditors are characterized as "badges of fraud" because they are circumstances tending to excite suspicion as to the conveyance, which, standing unexplained, may warrant an inference of fraud.¹ In other words, badges of fraud are circumstantial evidence from which intent may be inferred.² Indeed, certain circumstances are so commonly associated with fraud as to have earned the title "badges of fraud," and when present in sufficient number, they may give rise to an inference or presumption of fraud.³ Badges of fraud can also establish a prima facie case of a fraudulent conveyance.⁴ Badge of frauds, therefore, are circumstances that so frequently accompany fraudulent transfers that their presence gives rise to an inference of intent.⁵ The test is whether there is a satisfactory explanation for the circumstance,⁶ which may be inferred by a failure of the parties to testify or to produce available explanatory or rebutting evidence.⁷ "Badges of fraud" are therefore facts which call for an explanation.⁸

CUMULATIVE SUPPLEMENT

Cases:

Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader seeking to set aside a conveyance as based on actual fraud under New York law is allowed to rely on badges of fraud to support his case, that is, circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. [N.Y.McKinney's Debtor and Creditor Law § 276](#). [Priestley v. Panmedix Inc.](#), 18 F. Supp. 3d 486 (S.D. N.Y. 2014).

Under California law, there is no minimum number of badges of fraud that must be found in order to prove intentional fraudulent conveyance. [Cal. Civ. Code § 3439.04\(b\)](#). [AKH Company, Inc. v. Universal Underwriters Insurance Co.](#), 428 F. Supp. 3d 536 (D. Kan. 2019).

Badges of fraud that do not implicitly suggest fraud but do suggest there must have been a motivation other than the transaction itself because it was not an economically rational decision for a debtor to make but for its effect to hinder or delay creditors, for purposes of fraudulent transfer claim under Pennsylvania Uniform Voidable Transfer Act (PUVTA), include: the transfer or obligation was to an insider; the value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; and the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. 12 Pa. Stat. Ann. § 5104(b). [In re Carbone](#), 615 B.R. 76 (Bankr. E.D. Pa. 2020).

Four factors that Texas courts consider in deciding whether challenged transfer was made for a legitimate purpose, of kind sufficient to rebut presumption of fraud arising from presence of multiple badges of fraud, are whether transfer: (1) was made pursuant to standard business practice; (2) was arm's-length transaction; (3) was voluntary or effectively forced upon debtor; and (4) was for proper consideration. [V.T.C.A., Bus. & C. § 24.005\(b\)](#). [In re 1701 Commerce, LLC](#), 511 B.R. 812 (Bankr. N.D. Tex. 2014).

Judgment creditors' fraudulent conveyance claims against judgment debtor defendants were pled in sufficient detail to satisfy the heightened particularity requirement for pleading fraud or mistake; judgment creditors properly relied on various "badges of fraud" to show actual intent to defraud or hinder present or future creditors. [McKinney's Debtor and Creditor Law § 276](#); [McKinney's CPLR 3016\(b\)](#). [Uni-Rty Corp. v. New York Guangdong Finance, Inc.](#), 117 A.D.3d 427, 985 N.Y.S.2d 487 (1st Dep't 2014).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [In re Shore](#), 305 B.R. 559 (Bankr. D. Kan. 2004), *aff'd*, 317 B.R. 536 (B.A.P. 10th Cir. 2004) (applying Kansas law).
- 2 [Scantek Medical, Inc. v. Sabella](#), 583 F. Supp. 2d 477 (S.D. N.Y. 2008) (applying New York law).
- 3 [In re Montagne](#), 417 B.R. 232 (Bankr. D. Vt. 2009) (applying Vermont law); [LR Development Co. LLC v. C.I.R., T.C. Memo. 2010-203, T.C.M. \(RIA\) P 2010-203 \(2010\)](#) (applying Illinois law); [Blood v. Nofzinger](#), 162 Ohio App. 3d 545, 2005-Ohio-3859, 834 N.E.2d 358 (6th Dist. Huron County 2005).
- 4 [Mejia v. Ruiz](#), 985 So. 2d 1109 (Fla. 3d DCA 2008); [Ellen Equipment Corp. v. C.V. Consultants & Associates, Inc.](#), 144 N.M. 55, 2008-NMCA-057, 183 P.3d 940 (Ct. App. 2008); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 5 [Jecker v. Hidden Valley, Inc.](#), 422 N.J. Super. 155, 27 A.3d 964 (App. Div. 2011), certification denied, 210 N.J. 28, 40 A.3d 58 (2012); [Gevedon v. Ivey](#), 172 Ohio App. 3d 567, 2007-Ohio-2970, 876 N.E.2d 604 (2d Dist. Montgomery County 2007).
The trier of fact considers the evidence as a whole and in context to determine whether badges of fraud taken together constitute a pattern of fraudulent intent. [Klinker v. First Merchants Bank, N.A.](#), 964 N.E.2d 190 (Ind. 2012).
- 6 [Premier Financial Services v. Citibank \(Arizona\)](#), 185 Ariz. 80, 912 P.2d 1309 (Ct. App. Div. 1 1995) (requiring clear evidence of such).
- 7 [Premier Financial Services v. Citibank \(Arizona\)](#), 185 Ariz. 80, 912 P.2d 1309 (Ct. App. Div. 1 1995).
- 8 [Eli's, Inc. v. Lemen](#), 256 Neb. 515, 591 N.W.2d 543 (1999).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 13

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

C. Indicia or Badges of Fraud

§ 13. Effect of badge of fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  16

Badges of fraud do not establish fraud per se¹ but merely afford grounds for such an inference or conclusion.² In some states, the court may consider the transferor or transferee's good faith to negate this inference³ although not all states follow this rule.⁴ Furthermore, the mere presence of badges of fraud may not invalidate a transaction⁵ although they are red flags.⁶ Certainly, a badge of fraud standing alone may amount to little more than a suspicious circumstance, insufficient in itself to constitute fraud per se.⁷ Moreover, no single factor, among the possible badges of fraud, is determinative of fraudulent intent, and there is no set formula or threshold number of factors that warrant a finding of fraudulent intent.⁸

Practice Tip:

Once a party alleging a fraudulent transfer demonstrates a sufficient number of "badges of fraud," the burden of proof shifts to the defendant to prove that the transfer was not fraudulent in some states,⁹ but other states do not follow this burden shifting rule.¹⁰

Footnotes

- 1 [Tonnelier Const. Group, Inc. v. Shema](#), 48 So. 3d 163 (Fla. 1st DCA 2010); [Blood v. Nofzinger](#), 162 Ohio App. 3d 545, 2005-Ohio-3859, 834 N.E.2d 358 (6th Dist. Huron County 2005).
- 2 [In re Jarvar](#), 430 B.R. 607 (Bankr. D. Mont. 2010) (applying Montana law).
- 3 [U.S. v. McCombs](#), 928 F. Supp. 261 (W.D. N.Y. 1995) (applying New York law).
- 4 [Interpool Ltd. v. Patterson](#), 890 F. Supp. 259 (S.D. N.Y. 1995) (applying Florida law).
- 5 [Sylvester v. Sylvester](#), 723 P.2d 1253 (Alaska 1986).
- 6 [In re Shore](#), 305 B.R. 559 (Bankr. D. Kan. 2004), [aff'd](#), 317 B.R. 536 (B.A.P. 10th Cir. 2004) (applying Kansas law).
- 7 [Freeland v. Enodis Corp.](#), 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); [Tonnelier Const. Group, Inc. v. Shema](#), 48 So. 3d 163 (Fla. 1st DCA 2010).
- 8 [Klinker v. First Merchants Bank, N.A.](#), 964 N.E.2d 190 (Ind. 2012).
- 9 [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), [appeal dismissed in part](#), 2012 WL 748573 (D. Md. 2012) and [aff'd](#), 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [In re Lexington Oil and Gas Ltd., Co.](#), 423 B.R. 353 (Bankr. E.D. Okla. 2010) (applying Oklahoma law); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 10 [Prairie Lakes Health Care System, Inc. v. Wookey](#), 1998 SD 99, 583 N.W.2d 405 (S.D. 1998).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 14

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

C. Indicia or Badges of Fraud

§ 14. Examples of badges of fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  15

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 84](#) (Complaint, petition or declaration—Transfer through dummy grantee to transferor's spouse with intent to defraud creditors)

Examples of "badges of fraud" include transfers of property by a debtor during the pendency or threat of third-party creditor litigation;¹ the insolvency² or indebtedness of the debtor³ or transfers of property that render the debtor insolvent or greatly reduce his or her estate;⁴ transfer of the debtor's entire estate⁵ or a series of contemporaneous transactions that strip the debtor of all property available for execution;⁶ secret, concealed, or hurried transactions that are not in the usual mode of doing business;⁷ any transaction that is conducted in a manner differing from usual, customary, or ordinary methods;⁸ transactions whereby the debtor retains benefits;⁹ an interest,¹⁰ control, or dominion of the property;¹¹ inadequate, little, or no consideration given in return for a transfer;¹² fraudulent incurrence of indebtedness after the conveyance;¹³ and the relationship between the transferor and transferee.¹⁴

Additionally, the use of dummies or fictitious parties,¹⁵ the purchaser's failure to examine or inventory the goods bought or looseness or incorrectness in determining the value of the purchased property,¹⁶ the assumption of a business name for the sole purpose of receiving title to properties from the debtor where the assumed business name did not exist before the conveyance,¹⁷

the conveyance of property to a person having no apparent use for the property,¹⁸ the lack of an innocent purpose for the transfer,¹⁹ the general chronology of events and transactions under inquiry,²⁰ and the fact that the debtor has absconded are all considered badges of fraud.²¹ No one factor is dispositive to a finding of fraud.²²

CUMULATIVE SUPPLEMENT

Cases:

Common-law fraudulent conveyances are not an inducement-based fraud, but typically involve a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration. [Husky Intern. Electronics, Inc. v. Ritz](#), 136 S. Ct. 1581 (2016).

An inference of fraud intent, for purposes of a fraudulent conveyance claim under New York law, can be drawn from so-called "badges of fraud," including: (1) a close relationship between the parties to the transaction; (2) a secret and hasty transfer not in the usual course of business; (3) inadequacy of consideration; (4) the transferor's knowledge of the creditor's claim and his or her inability to pay it; (5) the use of dummies or fictitious parties; and (6) retention of control of the property by the transferor after the conveyance. [In re Application Pursuant to 28 U.S.C. Section 1782 of Okean B.V. and Logistic Solution Intern. to Take Discovery of Chadbourne & Parke LLP](#), 60 F. Supp. 3d 419 (S.D. N.Y. 2014).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 § 15.
- 2 [U.S. v. Porath](#), 764 F. Supp. 2d 883 (E.D. Mich. 2011), *aff'd*, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); [U.S. v. Stinson](#), 386 F. Supp. 2d 1207 (W.D. Okla. 2005) (applying Oklahoma law).
- 3 [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [In re Jones](#), 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); [Parker v. Parker](#), 268 Neb. 187, 681 N.W.2d 735 (2004).
- 4 [Freeland v. Enodis Corp.](#), 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); [U.S. v. Toler](#), 666 F. Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law).
- 5 [U.S. v. Toler](#), 666 F. Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law); [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [In re Jones](#), 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); [Parker v. Parker](#), 268 Neb. 187, 681 N.W.2d 735 (2004).
- 6 [In re Haddock](#), 246 B.R. 810 (Bankr. D. S.C. 2000) (applying South Carolina law); [Morgenthau v. A.J. Travis Ltd.](#), 184 Misc. 2d 835, 708 N.Y.S.2d 827 (Sup 2000).
- 7 § 16.
- 8 § 16.
- 9 [Freeland v. Enodis Corp.](#), 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [In re Jones](#), 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law).
- 10 [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 11 [U.S. v. Porath](#), 764 F. Supp. 2d 883 (E.D. Mich. 2011), *aff'd*, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); [U.S. v. Toler](#), 666 F.

- 12 Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law); *In re Rood*, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); *Fox Rest Associates, L.P. v. Little*, 282 Va. 277, 717 S.E.2d 126 (2011).
- 13 U.S. v. Toler, 666 F. Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law); *In re Rood*, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); *In re Jones*, 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); *Fox Rest Associates, L.P. v. Little*, 282 Va. 277, 717 S.E.2d 126 (2011).
- 14 *Fox Rest Associates, L.P. v. Little*, 282 Va. 277, 717 S.E.2d 126 (2011).
- 15 U.S. v. Toler, 666 F. Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law); *In re Rood*, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); *In re Jones*, 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law).
- 16 As to the effect of the parties' relationship in establishing a fraudulent conveyances, see §§ 31, 32.
- 17 *Amusement Industry, Inc. v. Midland Avenue Associates, LLC*, 820 F. Supp. 2d 510 (S.D. N.Y. 2011) (applying New York law); *In re Montalvo*, 333 B.R. 145 (Bankr. W.D. Ky. 2005) (applying Kentucky law).
- 18 *Tindall v. H & S Homes, LLC*, 757 F. Supp. 2d 1339 (M.D. Ga. 2011) (applying Georgia law).
- 19 *Roeckl v. F.D.I.C.*, 885 P.2d 1067 (Alaska 1994).
- 20 *Carroll v. Carroll*, 78 So. 3d 332 (Miss. Ct. App. 2010), cert. denied, 78 So. 3d 906 (Miss. 2012).
- 21 *In re Holcomb Health Care Services, LLC*, 329 B.R. 622 (Bankr. M.D. Tenn. 2004) (applying Tennessee law).
- 22 *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293 (Bankr. S.D. N.Y. 1999); *Breitenstine v. Breitenstine*, 2003 WY 16, 62 P.3d 587 (Wyo. 2003).
- 23 *In re Mussa*, 215 B.R. 158 (Bankr. N.D. Ill. 1997) (applying Illinois law).
- 24 *LR Development Co. LLC v. C.I.R., T.C. Memo. 2010-203, T.C.M. (RIA) P 2010-203* (2010) (applying Illinois law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 15

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

C. Indicia or Badges of Fraud

§ 15. Transfer in anticipation of litigation or after judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  [8](#), [10](#), [66](#), [162.1](#)

A.L.R. Library

[Conveyance as fraudulent where made in contemplation of possible liability for future tort](#), 38 A.L.R.3d 597

Although not every conveyance of property by one against whom a suit is pending can be deemed fraudulent,¹ one of the commonly recognized indicia of fraud is the transfer of property by a debtor in anticipation of a suit against him or her² while a suit against such debtor is pending³ or while judgments are outstanding against the debtor.⁴ This same rule has sometimes been applied to pending criminal actions,⁵ as well as renunciations to inheritances.⁶ Other considerations are whether a judgment has just been docketed against the transferor⁷ and whether the transferor has failed to satisfy a judgment rendered against him or her.⁸

Knowledge of the purchaser at the time of the purchase that a suit was pending against the seller does not necessarily establish a fraudulent intent on the purchaser's part,⁹ and the adverse evidentiary effect thereof may be overcome by proof that the purchaser acted in good faith and paid a valuable consideration.¹⁰ Indeed, the good faith of both transferor and transferee is an indispensable component of fair consideration in determining whether a transfer during the pendency of an action for money damages is a fraudulent conveyance.¹¹

Footnotes

- 1 In re Piccinini, 439 B.R. 100 (E.D. Mich. 2010) (applying Michigan law); Kaufmann v. Morales, 93 S.W.3d 650 (Tex. App. Houston 14th Dist. 2002).
- 2 S.E.C. v. Whitworth Energy Resources Ltd., 26 Fed. Appx. 723 (9th Cir. 2002) (applying California law); In re Montalvo, 333 B.R. 145 (Bankr. W.D. Ky. 2005) (applying Kentucky law); Shaffer v. Bellows, 260 P.3d 1064 (Alaska 2011); Carroll v. Carroll, 78 So. 3d 332 (Miss. Ct. App. 2010), cert. denied, 78 So. 3d 906 (Miss. 2012); Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. Ct. App. E.D. 2010), reh'g and/or transfer denied, (June 8, 2010).
- 3 Freeland v. Enodis Corp., 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); U.S. v. Porath, 764 F. Supp. 2d 883 (E.D. Mich. 2011), aff'd, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); Flannigan v. Vulcan Power Group, L.L.C., 712 F. Supp. 2d 63 (S.D. N.Y. 2010) (applying New York law); In re Rood, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and aff'd, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); In re Jones, 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); Deyeso v. Humbert, 76 Mass. App. Ct. 1115, 922 N.E.2d 181 (2010); Fox Rest Associates, L.P. v. Little, 282 Va. 277, 717 S.E.2d 126 (2011).
- 4 Matter of Reininger-Bone, 79 B.R. 53 (Bankr. M.D. Fla. 1987).
- 5 In re Jacobs, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law).
- 6 § 52.
- 7 First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law).
- 8 Palestine Monetary Authority v. Strachman, 62 A.D.3d 213, 873 N.Y.S.2d 281, 68 U.C.C. Rep. Serv. 2d 102 (1st Dep't 2009).
- 9 In re Van Vleck, 211 B.R. 689 (Bankr. E.D. Mo. 1997).
- 10 McCrary v. Bobenhausen, 366 So. 2d 77 (Fla. 1st DCA 1978).
- 11 Mega Personal Lines, Inc. v. Halton, 9 A.D.3d 553, 780 N.Y.S.2d 409 (3d Dep't 2004).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 16

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

C. Indicia or Badges of Fraud

§ 16. Secrecy; transactions not in usual course of doing business

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  8, 9, 15

Fraud may be inferred from unusual¹ and unexplained transactions,² or secret, concealed, or hasty transactions,³ not in the usual mode of doing business,⁴ as well as a debtor's conducting of business through the use of dummies or fictitious parties.⁵ Another badge of fraud is any transaction that is conducted in a manner differing from usual, customary, or ordinary methods,⁶ and thus, the courts look to see if there was a departure from customary methods which was inconsistent with honesty and fair dealing,⁷ as well as comparing the transaction at hand along with usual circumstances found in bona fide transactions.⁸

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Cendant Corp. v. Shelton](#), 474 F. Supp. 2d 377 (D. Conn. 2007) (applying Connecticut law); [In re Bernard L. Madoff Inv. Securities LLC](#), 445 B.R. 206 (Bankr. S.D. N.Y. 2011) (applying New York law).
- ² [Lawyers Title Ins. Corp. v. Dearborn Title Corp.](#), 22 F. Supp. 2d 820 (N.D. Ill. 1998) (applying Illinois law).
- ³ [Cendant Corp. v. Shelton](#), 474 F. Supp. 2d 377 (D. Conn. 2007) (applying Connecticut law); [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and [aff'd](#), 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [In re Bernard L. Madoff Inv. Securities LLC](#), 445 B.R. 206 (Bankr. S.D. N.Y. 2011) (applying New York law); [In re Jones](#), 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); [Dowlings, Inc. v. Homestead Dairies, Inc.](#), 88 A.D.3d 1226, 932 N.Y.S.2d 192 (3d Dep't 2011).
- ⁴ [Freeland v. Enodis Corp.](#), 540 F.3d 721 (7th Cir. 2008) (applying Indiana law).
- ⁵ § 14.
- ⁶ [Freeland v. Enodis Corp.](#), 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and [aff'd](#), 2012 WL 4517119

(D. Md. 2012) (applying Maryland law); *In re Jones*, 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law).

7 *Bank of Brimson v. Graham*, 335 Mo. 1196, 76 S.W.2d 376, 96 A.L.R. 399 (1934).

The fact that an instrument of conveyance was not recorded is a circumstance which will be considered by the fact finder in determining fraud. *In re Thomason*, 202 B.R. 768 (Bankr. D. Colo. 1996) (applying Colorado law; assignment of partnership interest).

8 *Textron Financial Corp. v. Kruger*, 545 N.W.2d 880 (Iowa Ct. App. 1996).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 17

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

C. Indicia or Badges of Fraud

§ 17. Failure to withhold property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  8, 9

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 20](#) (Complaint, petition or declaration—To set aside fraudulent transfer—Under Uniform Fraudulent Transfer Act and similar statutes—Transfer unreasonably impaired transferor's ability to pay)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 71](#) (Complaint—Allegation under Uniform Fraudulent Transfer Act and similar statutes—Inadequacy of transferor's remaining assets)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 101](#) (Answer—Defense—Failure to bring action within statutory period after fraudulent transfer under Uniform Fraudulent Transfer Act—Response to allegation that transferor intended to incur debts beyond transferor's ability to pay as they became due)

A debtor's failure to withhold or retain sufficient property following a transfer to pay the debtor's indebtedness is one indication of a fraudulent conveyance.¹ If a debtor fails to withhold sufficient property to pay his or her debts, the challenging creditor need not show fraudulent intent.²

Practice Tip:

To survive a motion to dismiss, the plaintiff must allege that it was foreseeable at the time of a distribution that the debtor's assets would be insufficient to satisfy its liabilities.³

CUMULATIVE SUPPLEMENT

Cases:

Creditor's former husband's transfer of a parcel of real estate to himself and his current wife as tenants by the entirety was both actually fraudulent and constructively fraudulent within meaning of the Pennsylvania Uniform Fraudulent Transfer Act (PUFTA); at the time of the transfer, there had been an ongoing dispute regarding the amount of spousal and child support arrearages which former husband and his current wife owed creditor, transfer removed the property from creditor's reach, former husband transferred the property without receiving a reasonably equivalent value in exchange, his transfer rendered him insolvent, he either believed or should have believed that he would incur debts beyond his ability to pay, and there was still \$525,000 of equity in the property. [12 Pa.C.S.A. § 5104](#). [Klein v. Weidner](#), 729 F.3d 280 (3d Cir. 2013).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Cordes & Co., LLC v. Mitchell Companies, LLC](#), 605 F. Supp. 2d 1015 (N.D. Ill. 2009) (applying Illinois law); [Apollo Real Estate Investment Fund, IV, L.P. v. Gelber](#), 403 Ill. App. 3d 179, 343 Ill. Dec. 735, 935 N.E.2d 963 (1st Dist. 2010), appeal denied, 238 Ill. 2d 647, 347 Ill. Dec. 249, 942 N.E.2d 452 (2010); [Albertson v. Robinson](#), 371 S.C. 311, 638 S.E.2d 81 (Ct. App. 2006).
- 2 [Mathis v. Burton](#), 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995).
- 3 [MSKP Oak Grove, LLC v. Venuto](#), 2012 WL 2369353 (D.N.J. 2012).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers II D Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.


II. Elements, Factors, and Requisites

D. Financial Condition of Transferor

[Topic Summary](#) | [Correlation Table](#)


Research References

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1), 57(3), 57(4), 61, 62, 202, 203, 271.3, 273, 277(1), 308(3)

A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  57(1), 57(3), 57(4), 61, 62, 202, 203, 271.3, 273, 277(1), 308(3)

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 18

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

D. Financial Condition of Transferor

§ 18. Effect of insolvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1), 57(3), 61, 62, 277(1)

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 39, 73](#) (Complaint—Allegation under Uniform Fraudulent Transfer Act and similar statutes—Insolvency of defendant transferor)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 64](#) (Complaint—To set aside fraudulent transfer—Under Uniform Fraudulent Transfer Act and similar statutes—Inadequacy of transferor's remaining assets—Transferred real property)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 72](#) (Complaint—Allegation under Uniform Fraudulent Transfer Act and similar statutes—Inability to pay debts as they become due)

A transfer is fraudulent if the debtor conveyed property without receiving a fair consideration and was insolvent¹ at the time of the transfer or would be made so by the transfer.² This is known as a constructively fraudulent transfer,³ and it is established without regard to intent.⁴ Indeed, in such a case, neither the intent of the debtor nor knowledge of the transferee need be proven⁵ as it is constructively established by the debtor being insolvent at the time of the transfer or being rendered insolvent thereby.⁶ Generally, the challenging party must show, in addition to establishing insolvency, that the transferor did not receive a fair consideration for the transfer.⁷ Furthermore, the showing of insolvency must establish the debtor's condition at the time of transfer, and it will not suffice to show that the transferor was insolvent or was thereby rendered insolvent at some subsequent

time.⁸ A person is insolvent at the time of the fraudulent transfer if the assets are less than the amount required to pay the person's probable liability on existing debts as they become absolute and matured.⁹

If actual intent to defraud is found, the debtor's solvency is immaterial to the determination of whether a transfer can be set aside as fraudulent.¹⁰ However, the debtor's solvency is one badge of fraud that may be considered in deciding whether actual intent to defraud exists.¹¹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Grochocinski v. Schlossberg, 402 B.R. 825 (N.D. Ill. 2009) (applying Illinois law); First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law); Arvest Bank v. Byrd, 814 F. Supp. 2d 775 (W.D. Tenn. 2011) (applying Tennessee law); Hawk v. C.I.R., T.C. Memo. 2012-259, T.C.M. (RIA) P 2012-259 (2012) (applying Tennessee law); Zanani v. Meisels, 78 A.D.3d 823, 910 N.Y.S.2d 533 (2d Dep't 2010).
As to insolvency, generally, see Am. Jur. 2d, Insolvency §§ 1 et seq.
- 2 Kipperman v. Onex Corp., 411 B.R. 805 (N.D. Ga. 2009), reconsideration denied in part, 2010 WL 761227 (N.D. Ga. 2010) (applying Georgia law); First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law); In re Carr & Porter, LLC, 416 B.R. 239 (Bankr. E.D. Va. 2009), decision aff'd, 416 B.R. 264 (E.D. Va. 2009) (applying Virginia law); Mejia v. Reed, 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (2003); Fox Rest Associates, L.P. v. Little, 282 Va. 277, 717 S.E.2d 126 (2011); Douglas v. Hill, 148 Wash. App. 760, 199 P.3d 493 (Div. 1 2009).
- 3 In re Rood, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and aff'd, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); CB Richard Ellis, Inc. v. CLGP, LLC, 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).
- 4 CB Richard Ellis, Inc. v. CLGP, LLC, 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011); In re Estate of Steele, 85 A.D.3d 1375, 925 N.Y.S.2d 250 (3d Dep't 2011); Fox Rest Associates, L.P. v. Little, 282 Va. 277, 717 S.E.2d 126 (2011).
- 5 Cresho v. Cresho, 97 Ohio App. 3d 5, 646 N.E.2d 183 (11th Dist. Ashtabula County 1994).
- 6 Matter of Tabala, 11 B.R. 405 (Bankr. S.D. N.Y. 1981) (applying New York law).
- 7 Pat Clark Sports, Inc. v. Champion Trailers, Inc., 487 F. Supp. 2d 1172 (D. Nev. 2007) (applying Nevada law); Mills v. Everest Reinsurance Co., 623 F. Supp. 2d 447 (S.D. N.Y. 2009), opinion adhered to on reconsideration, 2009 WL 7742508 (S.D. N.Y. 2009) (applying New York law); Murin v. Estate of Schwalen, 31 A.D.3d 1031, 819 N.Y.S.2d 341 (3d Dep't 2006).
As to consideration for a transfer, see §§ 25 to 30.
- 8 In re Le Cafe Creme, Ltd., 244 B.R. 221 (Bankr. S.D. N.Y. 2000) (applying New York law).
- 9 Molovinsky v. Fair Employment Council of Greater Washington, Inc., 154 Md. App. 262, 839 A.2d 755 (2003).
- 10 In re Lexington Oil and Gas Ltd., Co., 423 B.R. 353 (Bankr. E.D. Okla. 2010) (applying Oklahoma law).
- 11 Kaisha v. Dodson, 423 B.R. 888 (N.D. Cal. 2010) (applying California law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 19

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

D. Financial Condition of Transferor

§ 19. Tests for determining insolvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1), 57(4), 61, 62

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 123 to 125](#) (Jury instructions—Definitions of "solvency" and "insolvency")

The Uniform Fraudulent Transfer Act defines "insolvency" as follows:¹

- (a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.
- (b) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.
- (c) A partnership is insolvent under subsection (a) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.
- (d) Assets included in this calculation do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable.

Under the Uniform Fraudulent Conveyance Act, which is still in effect in some jurisdictions, a person is insolvent when the present fair salable value of his or her assets is less than the amount that will be required to pay the probable liability on the debtor's existing debts as they become absolute and matured.²

Additionally, poor financial condition for purposes of establishing a fraudulent conveyance is generally found where a person's debts or liabilities exceed his or her assets³ or where a person will be left with unreasonably small capital after the transfers⁴ or believes that he or she will be unable to pay future debts as they became due as the result of the transfers.⁵

Insolvency may be measured not merely at the time of the transfer⁶ but also at the time the plaintiff seeks to collect the amount due.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Unif. Fraudulent Transfer Act § 2](#) (noting that debts included in this rule do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset).
- 2 [Unif. Fraudulent Conveyance Act § 2\(1\)](#) (also including special rules for determining partnership insolvency in § 2(2)).
- 3 [Grochocinski v. Schlossberg](#), 402 B.R. 825 (N.D. Ill. 2009) (applying Illinois law); [In re Norstan Apparel Shops, Inc.](#), 367 B.R. 68 (Bankr. E.D. N.Y. 2007) (applying New York law); [In re Mastro](#), 465 B.R. 576 (Bankr. W.D. Wash. 2011) (applying Washington law).
- 4 [Kipperman v. Onex Corp.](#), 411 B.R. 805 (N.D. Ga. 2009), reconsideration denied in part, 2010 WL 761227 (N.D. Ga. 2010) (applying Georgia law); [First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc.](#), 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law); [In re Mastro](#), 465 B.R. 576 (Bankr. W.D. Wash. 2011) (applying Washington law).
- 5 [In re Hydrogen, L.L.C.](#), 431 B.R. 337 (Bankr. S.D. N.Y. 2010) (applying New York law); [In re Stanley](#), 384 B.R. 788 (Bankr. S.D. Ohio 2008) (applying Ohio law); [In re Mastro](#), 465 B.R. 576 (Bankr. W.D. Wash. 2011) (applying Washington law).
In determining whether a transfer was made with the actual intent to hinder, delay, or defraud any creditor, consideration may be given to whether the debtor was insolvent or became insolvent shortly after the transfer was made, or the obligation was incurred. [Unif. Fraudulent Transfer Act § 4\(b\)\(9\)](#); [Unif. Fraudulent Conveyance Act § 4](#).
- 6 [Future Group, II v. Nationsbank](#), 324 S.C. 89, 478 S.E.2d 45 (1996).
- 7 [Future Group, II v. Nationsbank](#), 324 S.C. 89, 478 S.E.2d 45 (1996).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 20

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

D. Financial Condition of Transferor

§ 20. Procedure in determining insolvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1), 308(3)

A determination of insolvency is a question of fact,¹ and the determination looks to the debtor's present ability to pay debts.² In some states, this process requires the court to recreate the financial condition of the debtor at the time the challenged transfer took place.³ It also requires the court to make an appraisal of probable liability versus the debtor's value of assets,⁴ which is made as to debts that are in existence when the conveyance is made.⁵ In finding a constructive fraudulent conveyance, some courts have found that as an alternative to showing insolvency, the plaintiff may show that the property remaining after the questionable conveyance is insufficient to pay the conveying party's probable liabilities on existing debts as they become mature.⁶ Elsewhere, the courts ask if the transferor is able to sell its assets at arm's length in market sales and pay its liabilities, including probable liability, on contingent debts,⁷ which involves valuing the debtor's assets as if the assets were individually sold with reasonable promptness in arm's length transactions in the existing and not theoretical market at the time the obligation was incurred.⁸

Under one approach, the debtor is "insolvent" if he or she is insolvent on a balance-sheet basis,⁹ and under the balance-sheet approach, the debtor is insolvent if the sum of his or her liabilities exceed the sum of his or her assets at fair valuation,¹⁰ excluding any property transferred, concealed, or removed with intent to hinder, delay, or defraud creditors.¹¹ Although the courts will consider unaudited balance sheets, expert testimony, and appraisals in calculating the "fair present salable value" of a transferor's assets to determine insolvency,¹² only assets with a present salable value are taken into consideration in determining insolvency; claims that are inchoate, uncertain, and contested have no present value and cannot be considered an asset of the company.¹³ For fraudulent conveyance purposes, a conveyance will be voided when the fair value of the salable assets is less than the amount required to pay existing debts as they become due as in that case, the debtor is considered "insolvent."¹⁴

Footnotes

- 1 Gillespie v. Sand-Rock Transit, Inc., 292 Ga. App. 661, 665 S.E.2d 385 (2008); Joslin v. Lopez, 309 A.D.2d 837, 765 N.Y.S.2d 895 (2d Dep't 2003).
- 2 U.S. v. St. Mary, 334 F. Supp. 799 (E.D. Pa. 1971) (applying Pennsylvania law).
- 3 In re Pajaro Dunes Rental Agency, Inc., 174 B.R. 557 (Bankr. N.D. Cal. 1994) (applying California law); CB Richard Ellis, Inc. v. CLGP, LLC, 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).
- 4 Patterson v. Missler, 238 Cal. App. 2d 759, 48 Cal. Rptr. 215 (4th Dist. 1965).
- 5 Nimick v. Shutty, 440 Pa. Super. 87, 655 A.2d 132 (1995); Crocker v. Ryan, 914 S.W.2d 551 (Tenn. Ct. App. 1995); Hudson v. Hudson, 249 Va. 335, 455 S.E.2d 14 (1995).
- 6 In re Flutie New York Corp., 310 B.R. 31 (Bankr. S.D. N.Y. 2004) (applying New York law).
- 7 In re Morse Tool, Inc., 148 B.R. 97 (Bankr. D. Mass. 1992) (applying Massachusetts law); In re Consolidated Capital Equities Corp., 175 B.R. 629 (Bankr. N.D. Tex. 1994) (applying California law).
- 8 In re Consolidated Capital Equities Corp., 143 B.R. 80 (Bankr. N.D. Tex. 1992) (applying California law).
- 9 In re Nirvana Restaurant Inc., 337 B.R. 495 (Bankr. S.D. N.Y. 2006) (applying New York law); In re Stanley, 384 B.R. 788 (Bankr. S.D. Ohio 2008) (applying Ohio law).
A state's Uniform Fraudulent Transfer Act's definition of "insolvency" mirrors the balance-sheet test for insolvency under the Bankruptcy Code. In re Zeigler, 320 B.R. 362 (Bankr. N.D. Ill. 2005) (applying Illinois law).
- 10 In re Stanley, 384 B.R. 788 (Bankr. S.D. Ohio 2008) (applying Ohio law); In re Pace, 456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law).
- 11 In re Canyon Systems Corp., 343 B.R. 615 (Bankr. S.D. Ohio 2006) (applying Ohio law).
- 12 In re Otis & Edwards, P.C., 115 B.R. 900 (Bankr. E.D. Mich. 1990).
- 13 First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law).
Book value nevertheless provides some evidence of the debtor's solvency. In re Nirvana Restaurant Inc., 337 B.R. 495 (Bankr. S.D. N.Y. 2006) (applying New York law).
- 14 Hanigan v. Trumble, 252 Neb. 376, 562 N.W.2d 526 (1997).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 21

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

D. Financial Condition of Transferor

§ 21. Factors in determining insolvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1)

In making an insolvency determination, the courts consider the type of asset involved,¹ and in the event the debtor's entire nonexempt property and assets are insufficient to pay his or her debts, the debtor is considered to be "insolvent."² Interests which are inchoate, uncertain, and contested lack a present fair salable value, have no present value, and cannot be considered assets.³ Unliquidated assets are also not considered,⁴ but contingent liabilities are considered,⁵ it matters not, when determining whether a debt counts for purposes of insolvency testing, that such debt (a) has not yet been reduced to judgment, (b) is still unliquidated, or (c) is subject to a genuine dispute.⁶ Additionally, contingent claims are considered in a solvency analysis under a state's Uniform Fraudulent Transfer Act only if there is a likelihood, as of the date solvency is being measured, that the contingency will occur.⁷ Contingent liabilities may be included in an insolvency analysis only in proportion to the likelihood that the obligation will be required to be satisfied.⁸

Observation:

Although few courts have established bright line tests for determining insolvency, some courts have observed that a useful guideline by which a court may evaluate the fairness of a transfer and determine a "reasonably equivalent value" is to ask whether the value that the debtor received represents at least 70% of the market value of the property transferred.⁹

CUMULATIVE SUPPLEMENT

Cases:

In determining a debtor's solvency under the Bankruptcy Code or the Illinois Uniform Fraudulent Transfer Act (IUFTA), the fair market value of property must be measured by what the property would bring if actually sold on the market at the time of the transfer, assuming an informed, hypothetical willing seller and an informed, hypothetical willing buyer not under compulsion to buy or sell, and having a reasonable amount of time to sell the property. [11 U.S.C.A. § 101\(32\)](#); S.H.A. [740 ILCS 160/3\(a\)](#). [In re Doctors Hosp. of Hyde Park, Inc.](#), 507 B.R. 558 (Bankr. N.D. Ill. 2013).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Leibowitz v. Parkway Bank and Trust Co.](#), 210 B.R. 298 (N.D. Ill. 1997), [aff'd](#), 139 F.3d 574 (7th Cir. 1998) (applying Illinois law).
- 2 [Tolle v. Fenley](#), 2006 UT App 78, 132 P.3d 63 (Utah Ct. App. 2006).
- 3 [First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc.](#), 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law).
- 4 [In re Otis & Edwards, P.C.](#), 115 B.R. 900 (Bankr. E.D. Mich. 1990).
- 5 [In re Davis](#), 148 B.R. 165 (Bankr. E.D. N.Y. 1992), [opinion aff'd](#), 169 B.R. 285 (E.D. N.Y. 1994) (applying New York law); [LR Development Co. LLC v. C.I.R.](#), T.C. Memo. 2010-203, T.C.M. (RIA) P 2010-203 (2010) (applying Illinois law).
- 6 [In re Arbogast](#), 466 B.R. 287 (Bankr. W.D. Pa. 2012), [aff'd](#), 479 B.R. 661 (W.D. Pa. 2012) (applying Pennsylvania law).
- 7 [Hullett v. Cousin](#), 204 Ariz. 292, 63 P.3d 1029 (2003).
- 8 [In re Tri-Valley Distributing, Inc.](#), 452 B.R. 837 (Bankr. D. Utah 2011) (applying Utah law).
- 9 [In re Goldberg](#), 229 B.R. 877 (Bankr. S.D. Fla. 1998).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 22

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

D. Financial Condition of Transferor

§ 22. Determining insolvency for businesses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1)

In terms of corporate debtors, if the corporation does not have significant capital assets to offset working capital deficits, it is insolvent.¹ The accepted test for determining unreasonably small capital, in the constructively fraudulent conveyance context, is reasonable foreseeability.² Stated another way, if the debtor received less than the reasonably equivalent value for a transfer and was either left with an unreasonably small amount of assets to carry on its business or else it intended to or it should have foreseen that it would incur debts beyond its ability to pay as they became due, the transfer is fraudulent and may be voided.³ A transaction leaves a company with unreasonably small capital, for purposes of a constructively fraudulent transfer, when it creates an unreasonable risk of insolvency, not necessarily a likelihood of insolvency.⁴ Like individuals, a corporation's solvency should be assessed as of the time of the alleged fraudulent conveyance.⁵ In assessing a corporation's adequate capital, the test is reasonable foreseeability of insolvency,⁶ as well as the reasonableness of the debtor's cash flow projections,⁷ given the circumstances on the date of the transfer.⁸ The test for whether a challenged transaction has left a company with inadequate capital to fund its operations is not the same as the test for insolvency; "unreasonably small capital" is something other than insolvency or inability to pay one's debts as they come due.⁹ In order to determine whether a debtor is operating with inadequate capital, a court must look at the debtor's debt to equity ratio, its historical capital cushion, and the need for working capital in the specific industry at issue; when assessing whether a company's projections are reasonable, courts may look to expert analysis by investment bankers and independent accounting firms which affirm management's projections but should also recognize that a powerful indication of contemporary, informed opinion as to value comes from private investors who with their finances and time at stake, and with access to substantial professional expertise, conclude at the time that the business was indeed one that could be profitably pursued, and the court may also consider the ability of a debtor to obtain financing in determining its financial condition.¹⁰ However, it has also been said that whether a transfer was fraudulent when made depends on conditions that existed when it was made, not on what happened later to affect the timing of the company's collapse.¹¹ The court must analyze whether the parties' projections were reasonable not with the benefit of hindsight but based upon whether they were

prudent when made.¹² Nevertheless, the length of the interval between a leveraged buyout and a company's collapse is pertinent to determining the effect of the transfer. The longer the interval, the less likely that the collapse was fated although 10 or 12 months is not necessarily a long enough interval to create a presumption that the terms of the buyout were not responsible for the company's failure.¹³

Insolvency can also be defined by the measure of liabilities against enterprise worth.¹⁴

Liabilities must be reduced to their present, or expected, value before a determination can be made whether the firm's assets exceed its liabilities.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

"Cash flow" test for whether a transfer made for less than reasonably equivalent value is avoidable as constructively fraudulent to creditors, on ground that debtor, while not insolvent at time of a transfer, intended to or believed that it would incur debts that would not cash flow, looks to whether debtor intended to incur, or believed that it would incur, debts that would be beyond its ability to pay as they matured. 11 U.S.C.A. § 548(a)(1)(B)(ii)(III). *In re Opus East, LLC*, 528 B.R. 30 (Bankr. D. Del. 2015).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Telefest, Inc. v. VU-TV, Inc.](#), 591 F. Supp. 1368 (D.N.J. 1984) (applying New Jersey law).
- 2 [In re Bachrach Clothing, Inc.](#), 2012 WL 4838998 (Bankr. N.D. Ill. 2012) (applying Illinois law).
- 3 [In re Bankest Capital Corp.](#), 374 B.R. 333 (Bankr. S.D. Fla. 2007) (applying Florida law); [Starnes v. C.I.R.](#), T.C. Memo. 2011-63, T.C.M. (RIA) P 2011-063 (2011), judgment aff'd, 680 F.3d 417 (4th Cir. 2012) (applying North Carolina's UFTA law); [Kirkeby v. Superior Court of Orange County](#), 33 Cal. 4th 642, 15 Cal. Rptr. 3d 805, 93 P.3d 395 (2004).
- 4 [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011) (applying the state's UFTA).
- 5 [Crepeau v. Gronager](#), 41 Conn. App. 302, 675 A.2d 1361 (1996).
- 6 [In re Bergman](#), 293 B.R. 580 (Bankr. W.D. N.Y. 2003) (applying New York's UFCA); [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011) (applying the state's UFTA).
- 7 [In re Bergman](#), 293 B.R. 580 (Bankr. W.D. N.Y. 2003) (applying New York's UFCA and including the reasonable of the projections of sales, profit margins, and net profits and losses, including difficulties that are likely to arise); [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).
- 8 [In re WCC Holding Corp.](#), 171 B.R. 972 (Bankr. N.D. Tex. 1994).
- 9 [In re Joy Recovery Technology Corp.](#), 286 B.R. 54 (Bankr. N.D. Ill. 2002) (applying Illinois law).
- 10 [Kipperman v. Onex Corp.](#), 411 B.R. 805 (N.D. Ga. 2009), reconsideration denied in part, 2010 WL 761227 (N.D. Ga. 2010) (applying Georgia law).
- 11 [Boyer v. Crown Stock Distribution, Inc.](#), 587 F.3d 787 (7th Cir. 2009) (applying Indiana law).
- 12 [In re Fidelity Bond and Mortg. Co.](#), 340 B.R. 266 (Bankr. E.D. Pa. 2006), order aff'd, 371 B.R. 708 (E.D. Pa. 2007) (applying Pennsylvania law).
- 13 [Boyer v. Crown Stock Distribution, Inc.](#), 587 F.3d 787 (7th Cir. 2009) (applying Indiana law).

- 14 [In re Bachrach Clothing, Inc.](#), 2012 WL 4838998 (Bankr. N.D. Ill. 2012) (applying Illinois law).
- 15 [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011) (applying the state's UFTA).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 23

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

D. Financial Condition of Transferor

§ 23. Effect of insolvency or indebtedness

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57, 202, 203

A fraudulent conveyance is illegal as to creditors only. As between the parties, and as to all others than creditors, it is legal and valid and can be enforced in all of its terms as any other contract.¹ However, it has also been held that, although a fraudulent transfer is voidable, a good faith transferee is entitled to a lien on the asset transferred up to the value given to the debtor for the transfer.² As to creditors, a good faith creditor that obtained for value a security interest in property that had been fraudulently conveyed has priority over a prior unsecured creditor that later obtained a judgment lien against the property pursuant to the Uniform Fraudulent Transfer Act. The fraudulent conveyance was not void but merely voidable from its inception, the unsecured creditor had no lien on the property when the good faith creditor perfected its interest, and thus, the good faith creditor obtained a valid prior interest in the property even if the transfer was later determined to be fraudulent and void.³ The fact that a debtor is insolvent is not grounds for setting aside a conveyance made for a valuable consideration and without intent to defraud, hinder, or delay creditors.⁴ Consequently, the owner of property, although he or she is greatly indebted or even insolvent, may sell it and give good title to a bona fide purchaser, despite the seller's creditors, up to the time when they shall have acquired a lien.⁵ However, the converse is also true; no conveyance may be adjudged fraudulent against creditors without proof that the transferor was insolvent at the time of the transfer or was rendered insolvent thereby.⁶ Furthermore, some courts hold that a fraudulent conveyance is established where a debtor was insolvent at the time of a transfer or would be made insolvent by the challenged transfer, and if the transfer was made without fair consideration, neither intent on the part of the debtor nor knowledge of the transferee need be proven.⁷ In that case, the law of fraudulent conveyances does not require a showing of actual fraudulent intent so long as the elements of constructive fraud are present.⁸

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

1 Hair v. Schellenberger, 966 N.E.2d 693 (Ind. Ct. App. 2012), transfer denied, 975 N.E.2d 360 (Ind. 2012).
2 Carbon v. Spokane Closing and Escrow, Inc., 135 Wash. App. 870, 147 P.3d 605 (Div. 3 2006).
3 Associates Housing Finance L.L.C. v. Stredwick, 120 Wash. App. 52, 83 P.3d 1032 (Div. 3 2004) (applying
4 Washington's UFTA).
5 Vazquez v. Santisteban, 334 So. 2d 97 (Fla. 3d DCA 1976).
6 Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (overruled on other grounds by, Duke City Lumber
7 Co., Inc. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975)).
8 Yetter Well Service, Inc. v. Cimarron Oil Co., Inc., 841 P.2d 1068 (Colo. App. 1992).
 Cresho v. Cresho, 97 Ohio App. 3d 5, 646 N.E.2d 183 (11th Dist. Ashtabula County 1994).
 McCall Stock Farms, Inc. v. U.S., 14 F.3d 1562 (Fed. Cir. 1993).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 24

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

D. Financial Condition of Transferor

§ 24. Effect of insolvency or indebtedness—Presumption of fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  271.3, 273

A.L.R. Library

[Assumption of Mortgage on Real Property as Consideration for Conveyance That Is Attacked as Fraudulent](#), 15 A.L.R.6th 241

Trial Strategy

[Avoidance and Recovery of Fraudulent Transfers](#), 25 Am. Jur. Proof of Facts 3d 591
[Conveyance With Intent to Defraud Creditors](#), 5 Am. Jur. Proof of Facts 2d 697

Forms

Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 118 (Jury instructions—Definition of reasonably equivalent value)

To establish fraud in law or constructive fraud for purposes of a fraudulent conveyance, a showing of fraudulent intent is not required; rather, fraud is presumed if the debtor transfers property for less than adequate value and is thereby unable to meet his or her obligations.¹ If a debtor is actually insolvent, he or she cannot alienate property and place it in a position where it is not subject to process on behalf of his or her creditors unless the debtor has received a full and fair consideration for the property transferred,² and the transfer has been made in good faith.³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [In re Knippen](#), 355 B.R. 710 (Bankr. N.D. Ill. 2006), judgment aff'd, 2007 WL 1498906 (N.D. Ill. 2007) (construing Illinois' UFTA); [Apollo Real Estate Investment Fund, IV, L.P. v. Gelber](#), 403 Ill. App. 3d 179, 343 Ill. Dec. 735, 935 N.E.2d 963 (1st Dist. 2010), appeal denied, 238 Ill. 2d 647, 347 Ill. Dec. 249, 942 N.E.2d 452 (2010).
As to the consideration for a transfer, see §§ 25 to 30.
- 2 [Dupree v. Quinn](#), 290 S.W.2d 329 (Tex. Civ. App. Texarkana 1956), judgment rev'd on other grounds, 157 Tex. 441, 303 S.W.2d 769 (1957).
- 3 [Hall v. Feeney](#), 22 S.D. 541, 118 N.W. 1038 (1908).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers II E Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

E. Consideration for Transfer

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  73 to 77, 84, 86, 87

A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  73 to 77, 84, 86, 87

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 25

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

E. Consideration for Transfer

§ 25. Fair consideration and reasonably equivalent value defined

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  73 to 76

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 117, 118](#) (Jury instructions—Definition of "value" and "reasonably equivalent value")

A determination of "fair consideration"¹ or "reasonably equivalent value"² is one which disregards the form of the transaction and looks instead to its substance and is fact sensitive.³ The Uniform Fraudulent Transfer Act speaks of the type of consideration that is required to avoid fraud as being a reasonably equivalent value.⁴ Whether a debtor received reasonably equivalent value is a question of fact that is based upon the facts and circumstances of each particular case.⁵ The Uniform Fraudulent Conveyance Act defines fair consideration as a fair equivalent for the property or obligation received in a good faith transfer.⁶ Most courts have agreed with this approach⁷ although others have discussed payment of a "substantial consideration,"⁸ a "valuable consideration,"⁹ and an "inadequate consideration."¹⁰ What constitutes a fair consideration or reasonably equivalent value is determined on a case-by-case basis¹¹ based on the facts and circumstances of each particular case¹² and must be determined from the standpoint of creditors.¹³ Some courts make the determination on the date of the transfer or the time of the transaction.¹⁴

Distinction:

The Uniform Fraudulent Transfer Act specifically enumerates badges of fraud while the Uniform Fraudulent Conveyance Act looks to common law; the UFTA requires lack of "reasonably equivalent value" as an element of constructive fraudulent transfer while the UFCA requires an absence of "fair consideration," defined as requiring both "fair equivalent" value and "good faith."¹⁵

CUMULATIVE SUPPLEMENT

Cases:

In strong-arm proceeding to avoid, as constructively fraudulent transfers, direct deposit of Chapter 7 debtor's wages into entireties account that he shared with his non-debtor wife, bankruptcy court did not clearly err in finding that debtor's wages were source of funds that remained in entireties and in another account at time of debtor's bankruptcy filing, and that debtor failed to receive "reasonably equivalent value" therefor, given lack of evidence as to how funds were ultimately spent. [11 U.S.C.A. § 544](#); [12 Pa.C.S.A. §§ 5104\(a\)\(2\)\(ii\)](#), 5105. [In re Wettach](#), 811 F.3d 99 (3d Cir. 2016).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [HBE Leasing Corp. v. Frank](#), 48 F.3d 623, 31 Fed. R. Serv. 3d 1422 (2d Cir. 1995) (applying New York law).
- 2 [In re Unglaub](#), 332 B.R. 303 (Bankr. N.D. Ill. 2005) (applying Illinois law).
- 3 [R.L. Friedland Realty, Inc. v. Mitlin Equities Corp.](#), 136 Misc. 2d 750, 519 N.Y.S.2d 170 (City Ct. 1987).
- 4 [Unif. Fraudulent Transfer Act § 4\(a\)\(2\)](#).
- 5 [In re Michigan Machine Tool Control Corp.](#), 381 B.R. 657 (Bankr. E.D. Mich. 2008) (applying Michigan law); [Hawk v. C.I.R.](#), T.C. Memo. 2012-259, T.C.M. (RIA) P 2012-259 (2012) (applying Tennessee law); [Starnes v. C.I.R.](#), T.C. Memo. 2011-63, T.C.M. (RIA) P 2011-063 (2011), judgment aff'd, 680 F.3d 417 (4th Cir. 2012) (applying North Carolina law).
- 6 [Unif. Fraudulent Conveyance Act § 3](#).
- 7 [Vost-Alpine Trading USA Corp. v. Vantage Steel Corp.](#), 732 F. Supp. 1315 (E.D. Pa. 1989), order aff'd in part, rev'd in part on other grounds, 919 F.2d 206 (3d Cir. 1990).
- 8 [Greystone Community Reinvestment Ass'n, Inc. v. Berean Capital, Inc.](#), 638 F. Supp. 2d 278 (D. Conn. 2009) (applying Connecticut law); [Abbott Terrace Health Center, Inc. v. Parawich](#), 120 Conn. App. 78, 990 A.2d 1267 (2010).
- 9 [In re Ducate](#), 355 B.R. 536 (Bankr. D. S.C. 2006) (applying South Carolina law); [Albertson v. Robinson](#), 371 S.C. 311, 638 S.E.2d 81 (Ct. App. 2006); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).

- 10 Cordes & Co., LLC v. Mitchell Companies, LLC, 605 F. Supp. 2d 1015 (N.D. Ill. 2009) (applying Illinois law); U.S. v. Stinson, 386 F. Supp. 2d 1207 (W.D. Okla. 2005) (applying Oklahoma law); Shaffer v. Bellows, 260 P.3d 1064 (Alaska 2011); Klinker v. First Merchants Bank, N.A., 964 N.E.2d 190 (Ind. 2012).
- 11 Lippe v. Bairnco Corp., 249 F. Supp. 2d 357 (S.D. N.Y. 2003), judgment aff'd, 99 Fed. Appx. 274 (2d Cir. 2004) (applying New York law).
- 12 Salus Mundi Foundation v. C.I.R., T.C. Memo. 2012-61, T.C.M. (RIA) P 2012-061 (2012) (applying New York law); Starnes v. C.I.R., T.C. Memo. 2011-63, T.C.M. (RIA) P 2011-063 (2011), judgment aff'd, 680 F.3d 417 (4th Cir. 2012) (applying North Carolina law); Commodity Futures Trading Com'n v. Walsh, 17 N.Y.3d 162, 927 N.Y.S.2d 821, 951 N.E.2d 369 (2011).
- 13 Smith v. American Founders Financial, Corp., 365 B.R. 647 (S.D. Tex. 2007) (applying Texas law); Starnes v. C.I.R., T.C. Memo. 2011-63, T.C.M. (RIA) P 2011-063 (2011), judgment aff'd, 680 F.3d 417 (4th Cir. 2012) (applying North Carolina law).
- 14 In re Calvillo, 263 B.R. 214 (W.D. Tex. 2000) (applying Texas law); In re Key3Media Group, Inc., 336 B.R. 87 (Bankr. D. Del. 2005), decision aff'd, 2006 WL 2842462 (D. Del. 2006) (applying New York law).
Hindsight should not be utilized in deciding whether the debtor received a "reasonably equivalent value." Creditor's Committee of Jumer's Castle Lodge, Inc. v. Jumer, 472 F.3d 943 (7th Cir. 2007) (applying Illinois law).
- 15 Allstate Ins. Co. v. Countrywide Financial Corp., 842 F. Supp. 2d 1216 (C.D. Cal. 2012).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 26

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

E. Consideration for Transfer

§ 26. Effect of lack of fair consideration

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  73 to 75

The Uniform Fraudulent Transfer Act provides that a transfer is fraudulent as to a creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor's finances were precarious as defined by the Act.¹ Similarly, the Uniform Fraudulent Conveyance Act forbids conveyances by one who is insolvent or will be rendered insolvent when the conveyance is made without a fair consideration by individuals,² persons engaged in businesses,³ and persons about to incur debts beyond their ability to pay.⁴ Lack of a fair consideration is also recognized by the courts to be a prime factor in determining whether a transaction is fraudulent.⁵

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Unif. Fraudulent Transfer Act § 4\(a\)\(2\)](#).
- ² [Unif. Fraudulent Conveyance Act § 4](#).
- ³ [Unif. Fraudulent Conveyance Act § 5](#).
- ⁴ [Unif. Fraudulent Conveyance Act § 6](#).
- ⁵ [In re Spatz, 222 B.R. 157 \(N.D. Ill. 1998\) \(applying Illinois law\); Palmer v. Murphy, 42 Mass. App. Ct. 334, 677 N.E.2d 247 \(1997\)](#).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 27

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

E. Consideration for Transfer

§ 27. Adequacy of consideration

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  76, 77

The determination of the adequacy¹ or fairness² of consideration is not governed by mathematical rules. There does not need to be proof of a dollar-for-dollar exchange,³ nor must there be a total lack of consideration.⁴ Similarly, the determination as to whether a debtor received "reasonably equivalent value" for a challenged transfer does not depend on a fixed mathematical formula⁵ but is based on a comparison of the value of what was transferred to the value of what the debtor received in exchange,⁶ with fair market value being one factor for the court to consider.⁷

Observation:

For fraudulent transfer purposes, a party does not provide "value" to an insolvent debtor by helping it conceal assets from a creditor, large or small, secured or unsecured.⁸

However, the courts do weigh the value of the goods sold and any direct or indirect benefits conferred as a result of a transfer,⁹ as well as all the circumstances to determine whether there is a reasonable and fair proportion between both sides of the transfer.¹⁰ Nominal consideration is insufficient to constitute fair consideration¹¹ or reasonably equivalent value,¹² as are promises to provide future services,¹³ or support for the debtor or another person;¹⁴ promises of love and affection;¹⁵ moral obligations;¹⁶ or

spiritual, emotional, psychological, or educational services.¹⁷ Rather, the benefits must go beyond some speculative, ephemeral, or psychic satisfaction that might result from doing a favor for a friend.¹⁸ Value must confer a direct, economic benefit upon the debtor, rather than an intangible, psychological benefit,¹⁹ but it has also been held that, in the context of a constructively fraudulent conveyance, value may include any benefit, whether direct or indirect.²⁰

Inadequacy of price does not mean an honest difference of opinion as to price but a consideration so far short of the real value of the property as to startle a correct mind or shock the moral sense.²¹ At the very least, the debtor, not a third person,²² must receive some indirect benefit from the transfer, and this benefit must be fairly concrete.²³ A debtor thus can receive fair consideration for a transfer indirectly, through a benefit conferred on a third party, provided that the value of the benefit received by the debtor approximates the value of the property or obligation he or she has given up, and such indirect benefits may include consideration flowing from the debtor to the guarantor, synergy, increased access to capital, safeguarding a source of supply, and protecting customer relationships, but an indirect benefit from the guarantee will not be recognized unless it is fairly concrete.²⁴ The consideration received must be something more than the consideration to support a contract,²⁵ and it must be secured or satisfied.²⁶ However, indirect benefits that cannot be quantified do not constitute "value" that would support a constructively fraudulent conveyance.²⁷

Observation:

Inadequacy of consideration alone is not a badge of fraud.²⁸

CUMULATIVE SUPPLEMENT

Cases:

Whether transfer is made for less than "reasonably equivalent value," as required for avoidance of transfer as constructively fraudulent to creditors under Florida law, depends on number of factors including good faith of parties, disparity between fair value of the property transferred and what debtor actually received, and whether transaction was at arm's length. [West's F.S.A. §§ 726.105\(1\)\(b\), 726.106\(1\)](#). [Welch v. Highlands Union Bank](#), 526 B.R. 152 (W.D. Va. 2015).

Whether debtor received valuable consideration, of kind sufficient to preclude avoidance of transfer as constructively fraudulent to creditors under Kentucky law, is to be determined at the time of challenged transfer. [Ky. Rev. Stat. Ann. § 378.020](#). [In re Licking River Mining, LLC](#), 603 B.R. 336 (Bankr. E.D. Ky. 2019), as amended, (July 19, 2019).

Chapter 7 debtor's use of residential mortgage property as home and dollar-for-dollar satisfaction of his legal obligation on mortgage note, not to mention the satisfaction of support obligations that debtor owed to his wife and dependent children, constituted "reasonably equivalent value," as well as "fair consideration," for debtor's monthly mortgage payments, so as to prevent avoidance, as constructively fraudulent to creditors under bankruptcy fraudulent transfer statute or New York fraudulent transfer law, either one-half of monthly mortgage payments that debtor made over the two-year period preceding petition date,

or one-half of monthly mortgage payments that debtor made over the six-year period preceding petition date. 11 U.S.C.A. §§ 544(b)(1), 548(a)(1)(B); N.Y. Debt. and Cred. Law § 273. In re Conti, 572 B.R. 73 (Bankr. W.D. N.Y. 2017).

Besides a finding of actual intent to hinder or delay a creditor, a transfer may be deemed fraudulent under the Utah Uniform Fraudulent Transfer Act (UFTA) if the transfer was made without the transferor receiving reasonably equivalent value in exchange, and the debtor's financial situation is thereafter inadequate for the business. Utah Code Ann. § 25-6-5(1)(b). In re Black Iron, LLC, 609 B.R. 390 (Bankr. D. Utah 2019).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Interpool Ltd. v. Patterson, 890 F. Supp. 259 (S.D. N.Y. 1995) (applying Florida law); Textron Financial Corp. v. Kruger, 545 N.W.2d 880 (Iowa Ct. App. 1996).
- 2 In re Actrade Financial Technologies Ltd., 337 B.R. 791 (Bankr. S.D. N.Y. 2005) (applying New York law).
- 3 In re Webb Mtn, LLC, 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law); Frank Sawyer Trust of May 1992 v. C.I.R., T.C. Memo. 2011-298, T.C.M. (RIA) P 2011-298 (2011) (applying Massachusetts law).
- 4 Cook v. Bieluch, 32 Conn. App. 537, 629 A.2d 1175 (1993) (overruled on other grounds by, Kaczynski v. Kaczynski, 294 Conn. 121, 981 A.2d 1068 (2009)).
- 5 In re Schneider, 417 B.R. 907 (Bankr. N.D. Ill. 2009) (applying Illinois law); In re Webb Mtn, LLC, 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law).
- 6 Creditor's Committee of Jumer's Castle Lodge, Inc. v. Jumer, 472 F.3d 943 (7th Cir. 2007) (applying Illinois law); Frank Sawyer Trust of May 1992 v. C.I.R., T.C. Memo. 2011-298, T.C.M. (RIA) P 2011-298 (2011) (applying Massachusetts law).
- 7 In re Webb Mtn, LLC, 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law).
- 8 In re MarketXT Holdings Corp., 426 B.R. 467 (Bankr. S.D. N.Y. 2010), judgment entered, 2010 WL 2342465 (Bankr. S.D. N.Y. 2010), subsequently dismissed, 455 Fed. Appx. 41 (2d Cir. 2012).
- 9 Interpool Ltd. v. Patterson, 890 F. Supp. 259 (S.D. N.Y. 1995).
- 10 In re Fordu, 201 F.3d 693, 1999 FED App. 0425P (6th Cir. 1999) (applying Ohio law); In re Pace, 456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law).
- 11 MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Services Co., 910 F. Supp. 913 (S.D. N.Y. 1995).
- 12 Wachovia Securities, LLC v. Neuhauser, 528 F. Supp. 2d 834 (N.D. Ill. 2007) (applying Illinois law in a constructive fraudulent conveyance context).
- 13 One Hundred Pearl Ltd. v. Vantage Securities, Inc., 887 F. Supp. 636 (S.D. N.Y. 1995) (applying New York law).
- 14 In re Carbaat, 357 B.R. 553 (Bankr. N.D. Cal. 2006) (applying California law); In re Ventimiglia, 362 B.R. 71 (Bankr. E.D. N.Y. 2007) (applying New York law).
- 15 Federal Refinance Co., Inc. v. Klock, 352 F.3d 16 (1st Cir. 2003) (applying former Massachusetts UFCA law); In re Marlar, 267 F.3d 749 (8th Cir. 2001) (applying Arkansas UFTA law; consideration of \$10 was also provided); In re Jacobs, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law); Albertson v. Robinson, 371 S.C. 311, 638 S.E.2d 81 (Ct. App. 2006) (consideration of \$5 was also provided).
- 16 Rubenstein v. C.I.R., 134 T.C. 266, 2010 WL 2300752 (2010) (applying Florida law); Doe v. Ewing, 205 Mich. App. 605, 517 N.W.2d 849 (1994).
- 17 In re Bloch, 207 B.R. 944 (D. Colo. 1997).
- 18 Mann v. Hanil Bank, 920 F. Supp. 944 (E.D. Wis. 1996).
- 19 In re Schaefer, 331 B.R. 401 (Bankr. N.D. Iowa 2005) (applying Iowa law).

- 20 Smith v. American Founders Financial, Corp., 365 B.R. 647 (S.D. Tex. 2007) (applying Texas law); In re
Yellowstone Mountain Club, LLC, 436 B.R. 598 (Bankr. D. Mont. 2010), amended on other grounds on
reconsideration in part, 2010 WL 3504210 (Bankr. D. Mont. 2010) (applying Montana law); In re Hanson,
373 B.R. 522 (Bankr. N.D. Ohio 2007) (applying Ohio law); In re Scheffler, 471 B.R. 464 (Bankr. E.D.
Pa. 2012) (applying Pennsylvania law); Frank Sawyer Trust of May 1992 v. C.I.R., T.C. Memo. 2011-298,
T.C.M. (RIA) P 2011-298 (2011) (applying Massachusetts law).
- 21 Neal v. Clark, 75 Ariz. 91, 251 P.2d 903 (1952).
- 22 National Westminster Bank N.J. v. Anders Engineering, Inc., 289 N.J. Super. 602, 674 A.2d 638 (App. Div.
1996); Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).
- 23 In re Yellowstone Mountain Club, LLC, 436 B.R. 598 (Bankr. D. Mont. 2010), amended on other grounds
on reconsideration in part, 2010 WL 3504210 (Bankr. D. Mont. 2010) (applying Montana law); In re Pace,
456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law).
- 24 In re Asia Global Crossing, Ltd., 344 B.R. 247 (Bankr. S.D. N.Y. 2006) (applying New York law).
- 25 In re Image Worldwide, Ltd., 139 F.3d 574 (7th Cir. 1998).
- 26 Chemical Bank v. Dana, 234 B.R. 585 (D. Conn. 1999), judgment aff'd, 2 Fed. Appx. 180 (2d Cir. 2001)
(applying Connecticut law).
- 27 In re Solomon, 299 B.R. 626 (B.A.P. 10th Cir. 2003) (applying Oklahoma law); In re Yellowstone Mountain
Club, LLC, 436 B.R. 598 (Bankr. D. Mont. 2010), amended on other grounds on reconsideration in part,
2010 WL 3504210 (Bankr. D. Mont. 2010) (applying Montana law).
- 28 Diss v. Agri Business Intern., Inc., 670 N.E.2d 97 (Ind. Ct. App. 1996).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 28

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

E. Consideration for Transfer

§ 28. Adequacy of consideration—Factors for determining fair consideration or reasonably equivalent consideration, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  76

A.L.R. Library

[Conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent as against creditors, 45 A.L.R.2d 500](#)

Among the circumstances considered by the courts in deciding whether the value that the debtor received for the challenged transfer was "reasonably equivalent" to what he or she gave up such that the transfer may not be avoided as constructively fraudulent to creditors are: (1) the fair market value of what the debtor received; (2) the existence of an arm's length relationship between the debtor and the transferee; and (3) the transferee's good faith.¹ As also stated, circumstances examined for a fair consideration determination include whether the transaction was conducted at arm's length, whether property or value was transferred to the debtor, whether the debtor received additional and valuable benefits as a result of the transaction, whether the debtor was rendered execution proof, and whether the transaction was made in good faith.²

While there is no minimum percentage or amount required to equal reasonably equivalent value, the phrase "reasonably equivalent value" means approximately equivalent or roughly equivalent.³ Furthermore, it is generally recognized that a person may be a purchaser for a fair or valuable consideration although he or she has not given money or money's worth for the property. For example, legal services rendered are generally held to constitute fair consideration for such transfers.⁴ Moreover, a marital settlement may constitute a sufficient consideration.⁵

In determining whether a debtor received reasonably equivalent value, the proper focus is on the net effect of the transfers on the debtor's estate and funds available to unsecured creditors.⁶

Practice Tip:

Proof of the adequacy of consideration may require a showing of an actual intent to defraud creditors to void the transaction.⁷

CUMULATIVE SUPPLEMENT

Cases:

Judgment creditor, by alleging that judgment debtor, during pendency of judgment creditor's underlying action against judgment debtor for breach of contract, conveyed to his wife his interest in a home that he and wife owned as tenants by the entirety, without fair consideration, and that the final judgment in the underlying action remained unsatisfied, stated a claim for fraudulent conveyance. [McKinney's Debtor and Creditor Law § 273–a. William J. Jenack Estate Appraisers and Auctioneers, Inc. v. Rabizadeh](#), 131 A.D.3d 960, 2015 WL 5124894 (2d Dep't 2015).

To show fair equivalent value for conveyance, as required under New York's Debtor and Creditor Law, neither mathematical precision nor a "penny-for-penny exchange" is required; rather, the assessment of fair equivalent value requires a court to compare the rough values of what was given and what was received in exchange. [N.Y.McKinney's Debtor and Creditor Law § 272. Chen v. New Trend Apparel, Inc.](#), 8 F. Supp. 3d 406 (S.D. N.Y. 2014).

Annual salary of \$30,000 paid by judgment debtor to his wife was in full and fair consideration of wife's part-time work for judgment debtor, and thus were not fraudulent conveyances; wife's duties included bookkeeping, driving judgment debtor, planning one large special event, liaising with government agencies, and generally assisting judgment debtor with his property management responsibilities, and judgment debtor took reasonable steps to determine that salary was reasonable. [McKinney's Debtor and Creditor Law § 273–a. Breslin Realty Development Corp. v. Smith & De Groat, Inc.](#), 30 N.Y.S.3d 496 (Sup 2016).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [In re Scheffler](#), 471 B.R. 464 (Bankr. E.D. Pa. 2012) (applying Pennsylvania law).
- 2 [In re TML, Inc.](#), 291 B.R. 400, 50 U.C.C. Rep. Serv. 2d 511 (Bankr. W.D. Mich. 2003) (applying Michigan law).
- 3 [In re Webb Mtn, LLC](#), 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law).
- 4 [Marroquin v. Barrial](#), 174 Cal. App. 2d 540, 345 P.2d 30 (2d Dist. 1959).

- 5 Federal Deposit Ins. Corp. v. U.S., 654 F. Supp. 794 (N.D. Ga. 1986).
6 In re Pace, 456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law).
7 Hassett v. Goetzmann, 10 F. Supp. 2d 181 (N.D. N.Y. 1998) (applying New York law); Royal Z Lanes, Inc.
v. Collins Holding Corp., 337 S.C. 592, 524 S.E.2d 621 (1999).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 29

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

E. Consideration for Transfer

§ 29. Adequacy of consideration—Satisfaction of antecedent debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  86, 87

A.L.R. Library

[Transaction in consideration of discharge of antecedent debt owed by one other than grantor as based on "fair consideration" under Uniform Fraudulent Conveyance Act, 30 A.L.R.2d 1209](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 105](#) (Answer—Defense—Transferee paid for and received transfer as bona fide purchaser)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 106](#) (Answer—Defense—Property transferred to lender of purchase money)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 107](#) (Answer—Defense—Property transferred to mortgagee to satisfy mortgage indebtedness)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 141](#) (Assumption of transferor's debts by transferee as constituting reasonably equivalent value)

Satisfaction of an antecedent debt or preexisting liability is generally considered a fair consideration¹ if the property conveyed is fairly equivalent in value to the debt satisfied.² Alternatively, in order to satisfy the statutory requirement for "fair consideration," the conveyance may constitute a present exchange.³ Where the satisfaction of an antecedent debt is acknowledged by the statute to be "value" for purposes of a fraudulent transfer analysis, the individual satisfactions flowing from payments for household expenses in exchange for a dollar-for-dollar satisfaction of household debt may provide reasonably equivalent value in exchange for those payments.⁴

Reasonably equivalent value, for constructive fraudulent transfer avoidance purposes, can include the elimination of claims or litigation within the scope of satisfaction of an antecedent debt.⁵

Conveyances that satisfy an antecedent debt made while the debtor is insolvent are neither fraudulent nor otherwise improper even if their effect is to prefer one creditor over another.⁶ It is of no significance that the transferee has knowledge of such insolvency, and the transfer is not subject to attack by reason of knowledge on the part of the transferee that the transferor is preferring him or her to other creditors even by virtue of a secret agreement to that effect.⁷ However, although an antecedent debt may provide fair consideration for a conveyance, it must be in an amount not disproportionately small as compared with the value of the property obtained.⁸ Where the debtor derives little benefit from the securing of his or her antecedent debt, the debtor does not receive a reasonably equivalent value.⁹ Furthermore, there are instances where a conveyance in exchange for an antecedent debt will not suffice, such as in the case where the transferee is an officer, director, or major shareholder of the transferor¹⁰ or where an obligation is satisfied that is owed to the transferee by a third party.¹¹

A debt that is incurred at essentially the same time as the questioned conveyance cannot constitute an antecedent debt.¹²

CUMULATIVE SUPPLEMENT

Cases:

Funds received by judgment debtor's attorneys were for bona fide legal fees and litigation expenses rendered and represented an exchange of reasonably equivalent value, and therefore attorneys did not violate Uniform Fraudulent Transfer Act (UFTA); debtor was primary defendant at underlying trial resulting in judgment rendered against him, legal fees and expenses were legitimate and owed by debtor, and retainers provided by debtor were placed in IOLTA account, remaining debtor's property and subject to attachment. R.C. §§ 1336.04(A), 1336.05, 1336.08. [Magnum Steel & Trading, L.L.C. v. Roderick Linton Belfance, L.L.P., 2015-Ohio-3450, 41 N.E.3d 204](#) (Ohio Ct. App. 9th Dist. Summit County 2015).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Federal Refinance Co., Inc. v. Klock, 352 F.3d 16 \(1st Cir. 2003\)](#) (applying former UFCA Massachusetts law); [Pat Clark Sports, Inc. v. Champion Trailers, Inc., 487 F. Supp. 2d 1172 \(D. Nev. 2007\)](#) (applying Nevada law); [Federal Nat. Mortg. Ass'n v. Olympia Mortg. Corp., 792 F. Supp. 2d 645 \(E.D. N.Y. 2011\)](#) (applying New York law).
- 2 [In re Jodoin, 208 B.R. 6 \(Bankr. D. N.H. 1997\)](#) (applying New Hampshire law).
- 3 [Federal Nat. Mortg. Ass'n v. Olympia Mortg. Corp., 792 F. Supp. 2d 645 \(E.D. N.Y. 2011\)](#) (applying New York law).

- 4 In re Kennedy, 279 B.R. 455 (Bankr. D. Conn. 2002) (applying Connecticut law).
- 5 In re Webb Mtn, LLC, 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law).
- 6 In re Sharp Intern. Corp., 403 F.3d 43 (2d Cir. 2005) (applying New York law); Town of Southampton v. Chiodi, 75 A.D.3d 604, 907 N.Y.S.2d 25 (2d Dep't 2010).
- 7 Town of Southampton v. Chiodi, 75 A.D.3d 604, 907 N.Y.S.2d 25 (2d Dep't 2010).
- 8 Joslin v. Lopez, 309 A.D.2d 837, 765 N.Y.S.2d 895 (2d Dep't 2003).
- 9 S.E.C. v. Whitworth Energy Resources Ltd., 26 Fed. Appx. 723 (9th Cir. 2002) (applying California law to the fraudulent conveyance of a lien to a parent in exchange for the parent's forbearance from suit where the parent would not have sued on the lien anyway).
- 10 First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law).
- 11 Dahnken, Inc. of Salt Lake City v. Wilmarth, 726 P.2d 420 (Utah 1986).
- 12 Truelove v. Buckley, 12 Fulton County D. Rep. 3360, 2012 WL 5265797 (Ga. Ct. App. 2012).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 30

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

E. Consideration for Transfer

§ 30. Adequacy of consideration—Assumption of mortgage or debts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  84

A.L.R. Library

[Assumption of Mortgage on Real Property as Consideration for Conveyance That Is Attacked as Fraudulent](#), 15 A.L.R.6th 241

Since a transferee's assumption of a transferor's bona fide debts can constitute a valuable and sufficient consideration for the conveyance of the grantor's property,¹ the assumption of a mortgage generally constitutes consideration for the conveyance of property from an insolvent grantor.² This is especially the result where the assumption is binding upon the grantee so as to make him or her the principal debtor³ or where the value of the land and the amount of the mortgage are substantially equal.⁴ However, not all such transactions will be approved; for example, despite the otherwise adequacy of the consideration, some conveyances have been voided where the grantee was unable to pay the mortgage debt which was assumed,⁵ where the disparity between the amount of the mortgage and the value of the property is so great such that the transaction is one intended to defraud creditors,⁶ or where the supposed consideration was the forgiveness of a debt which was at best a moral obligation.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

¹ As to satisfaction of an antecedent debt as adequate consideration, see [§ 29](#).

- 2 [Thornton v. Wolf](#), 958 So. 2d 131 (La. Ct. App. 3d Cir. 2007); [Gevedon v. Ivey](#), 2003-Ohio-6521, 2003 WL 22880791 (Ohio Ct. App. 2d Dist. Montgomery County 2003) (assumption of mortgage and forgiveness of debt in exchange for title).
- 3 [Bargioni v. Hill](#), 59 Cal. 2d 121, 28 Cal. Rptr. 321, 378 P.2d 593 (1963).
- 4 [Territorial Sav. & Loan Ass'n v. Baird](#), 781 P.2d 452 (Utah Ct. App. 1989).
- 5 [Wurlitzer Distributing Corp. v. Schofield](#), 44 N.C. App. 520, 261 S.E.2d 688 (1980).
- 6 [U.S. v. Chapman](#), 756 F.2d 1237 (5th Cir. 1985) (applying Texas law).
- 7 [Morris v. Holland](#), 529 S.W.2d 948 (Mo. Ct. App. 1975).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers II F Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

F. Relationship of Parties

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#) 🔑 101 to 108

A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#) 🔑 101 to 108

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 31

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

F. Relationship of Parties

§ 31. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  101 to 108

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 83](#) (Complaint, petition, or declaration—Real property transferred from one spouse to other spouse with intent to defraud creditors—Inadequate consideration)

A special relationship between the debtor and the transferee serving as circumstantial evidence of fraudulent intent, for purposes of a claim for actual fraudulent transfer, may include a family, friendship, or close associate relationship.¹ The fact that the parties to a transfer of property are somehow related or that a close relationship exists between them does not warrant a presumption that the transaction is fraudulent as to creditors² as each case is decided on its own facts.³ While a familial relationship between the transferor and the transferee is not itself a badge of fraud, for purposes of establishing a prima facie case of fraudulent conveyance, transactions between husband and wife must be closely scrutinized to see that they are fair and honest and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of his creditors.⁴ Moreover, the relationship of the parties,⁵ including that of parent and child, when coupled with other suspicious circumstances, gives rise to an inference of fraud.⁶ Thus, for purposes of a constructive fraudulent conveyance claim, presumptions of good faith and reasonably equivalent value do not apply if the transfer is made to an insider.⁷ A transfer to a family member or an affiliated corporation alone is not dispositive of a fraudulent intent⁸ and may not by itself constitute a badge of fraud.⁹ Thus, according to some courts, there is generally no presumption that transactions between close relatives or insiders are per se fraudulent¹⁰ though a familial relationship may strengthen the presumption of fraud that arises from other circumstances¹¹ and constitute

weighty proof of fraudulent intent.¹² Under this line of thought, evidence of a transfer to an insider is only one factor to consider in determining actual intent to defraud, and that fact alone does not support a conclusion the transfer constitutes a fraudulent transfer.¹³ However, the rule is different if, at the time of an interspousal conveyance, a conveying spouse was in financial difficulty, and the conveyance was made with the actual intent to hinder, delay, or defraud the conveyor's creditors; in such a case, that conveyance is considered prima facie fraudulent.¹⁴

Indeed, a transfer between spouses, either before or after the dissolution of their marriage, may be avoided as a fraudulent transfer.¹⁵ Moreover, at least one court has pointed out that fraudulent intent is presumed when property is transferred to relatives.¹⁶ Another court has stated that a conveyance will be deemed fraudulent where the transfer is to an insider and if it is for an antecedent debt, and the insider knew the debtor was insolvent.¹⁷ In determining insider status, courts are to consider (1) the closeness of the relationship between the transferee and the debtor and (2) whether the transactions were at arm's length.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

Under Kentucky law, a transfer between two related parties is typically a badge of fraud. [KRS 378.010. Jadco Enterprises, Inc. v. Fannon](#), 991 F. Supp. 2d 947 (E.D. Ky. 2014).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Kaisha v. Dodson](#), 423 B.R. 888 (N.D. Cal. 2010) (applying California law).
A relative or partner of the debtor can constitute an insider. [Grochocinski v. Schlossberg](#), 402 B.R. 825 (N.D. Ill. 2009) (applying Illinois law).
A paramour whom debtor never married following her divorce from another man was not "insider," for fraudulent transfer avoidance purposes, [In re Grove-Merritt](#), 406 B.R. 778 (Bankr. S.D. Ohio 2009) (applying Ohio law), nor was an unmarried cohabiting partner. [Porter v. Saez](#), 2004-Ohio-2498, 2004 WL 1103508 (Ohio Ct. App. 10th Dist. Franklin County 2004).
- 2 [In re Laines](#), 352 B.R. 397 (Bankr. E.D. Va. 2005) (applying Virginia law); [Gurley v. Blue Rents, Inc.](#), 383 So. 2d 531 (Ala. 1980).
- 3 [Childress v. Fidelity & Cas. Co. of N. Y.](#), 194 Va. 191, 72 S.E.2d 349, 35 A.L.R.2d 1 (1952).
- 4 [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 5 [In re Dreier LLP](#), 452 B.R. 391 (Bankr. S.D. N.Y. 2011) (applying New York law).
- 6 [S.E.C. v. Whitworth Energy Resources Ltd.](#), 26 Fed. Appx. 723 (9th Cir. 2002).
- 7 [In re Old CarCo LLC](#), 435 B.R. 169 (Bankr. S.D. N.Y. 2010) (applying New York law).
- 8 [In re Schofield-Johnson, LLC](#), 462 B.R. 539 (Bankr. M.D. N.C. 2011) (applying North Carolina law).
However, when a creditor attacks a conveyance between spouses, slight circumstances may be sufficient to establish fraud. [Gerschick v. Pounds](#), 281 Ga. App. 531, 636 S.E.2d 663 (2006).
- 9 [Production Credit Ass'n of Midlands v. Shirley](#), 485 N.W.2d 469, 18 U.C.C. Rep. Serv. 2d 562 (Iowa 1992); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 10 [In re Mussa](#), 215 B.R. 158 (Bankr. N.D. Ill. 1997) (applying Illinois law); [G.M. Houser, Inc. v. Rodgers](#), 204 S.W.3d 836 (Tex. App. Dallas 2006).
- 11 [In re Laines](#), 352 B.R. 397 (Bankr. E.D. Va. 2005) (applying Virginia law).
- 12 [In re Phillips](#), 379 B.R. 765 (Bankr. N.D. Ill. 2007) (applying Illinois law).

- 13 [Doyle v. Kontemporary Builders, Inc.](#), 370 S.W.3d 448 (Tex. App. Dallas 2012), reh'g overruled, (June 6, 2012) and review denied, (Oct. 19, 2012).
- 14 [Citizens & Southern Nat. Bank v. Auer](#), 514 F. Supp. 638 (E.D. Tenn. 1981) (applying Tennessee law).
- 15 [In re Beverly](#), 374 B.R. 221 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008) (applying California law).
- 16 [U.S. v. Harrison](#), 366 B.R. 656 (S.D. Tex. 2007), motion for stay pending appeal denied, 99 A.F.T.R.2d 2007-2748, 2007 WL 1428635 (S.D. Tex. 2007) and judgment aff'd, 273 Fed. Appx. 315 (5th Cir. 2008) (applying Texas law).
- 17 [Truelove v. Buckley](#), 12 Fulton County D. Rep. 3360, 2012 WL 5265797 (Ga. Ct. App. 2012).
- 18 [Essex Crane Rental Corp. v. Carter](#), 371 S.W.3d 366 (Tex. App. Houston 1st Dist. 2012), reh'g overruled, (June 7, 2012) and review denied, (Aug. 31, 2012).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 32

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

F. Relationship of Parties

§ 32. Effect of parties' relationship

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  101 to 108

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 82](#) (Complaint, petition, or declaration—Conveyance of separate property of debtor spouse to other spouse with intent to defraud creditor—Absence of any consideration for transfer)

Because spouses, as well as other relatives or persons closely related to the debtor, have unusual opportunities for the perpetration of fraud, it is generally held that conveyances between relatives or "insiders"¹ must be carefully or closely scrutinized by the courts,² and at the very least, it is a consideration as to whether a transfer was a fraudulent conveyance.³ Additionally, where the fact of fraud is in issue or where suspicious circumstances exist, that may be sufficient to raise an inference of fraud in a conveyance.⁴ This same rule applies where one person is on both sides of the same transaction.⁵ Thus, the courts have ruled that among the recognized indicia or badges of fraud is the fact that the transfer is between members of a family,⁶ or persons related by marriage,⁷ particularly where the transfer causes the family member or spouse to become insolvent.⁸ The same position has been taken where the parties to the conveyance are associated in business⁹ or any other confidential relationship.¹⁰

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 In re Mussa, 215 B.R. 158 (Bankr. N.D. Ill. 1997) (applying Illinois law); Morris v. Nance, 132 Or. App. 216, 888 P.2d 571 (1994) (holding former husband of debtor was an "insider").
- 2 U.S. v. Porath, 764 F. Supp. 2d 883 (E.D. Mich. 2011), aff'd, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); In re Jacobs, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law); In re Stanley, 384 B.R. 788 (Bankr. S.D. Ohio 2008) (applying Ohio law); Laird v. Weigh Systems South II, Inc., 98 Ark. App. 393, 255 S.W.3d 900 (2007); Essex Crane Rental Corp. v. Carter, 371 S.W.3d 366 (Tex. App. Houston 1st Dist. 2012), reh'g overruled, (June 7, 2012) and review denied, (Aug. 31, 2012).
- 3 General Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485, 47 Fed. R. Evid. Serv. 670 (11th Cir. 1997) (applying Florida law).
- 4 Johnson v. Drew, 218 Cal. App. 2d 614, 32 Cal. Rptr. 540 (2d Dist. 1963).
- 5 Brown v. Cooper, 237 Ga. App. 348, 514 S.E.2d 857 (1999); South Side Nat. Bank in St. Louis v. Winfield Financial Services Corp., 783 S.W.2d 140 (Mo. Ct. App. E.D. 1989) (corporation to whom transfer was made was controlled by debtor).
- 6 Ginsburg v. Ginsburg, 353 Ark. 816, 120 S.W.3d 567 (2003).
- 7 Banner Const. Corp. v. Arnold, 128 So. 2d 893 (Fla. 1st DCA 1961).
- 8 Granwell v. Granwell, 20 N.Y.2d 91, 281 N.Y.S.2d 783, 228 N.E.2d 779 (1967).
- 9 In re Beshears, 182 B.R. 235 (Bankr. E.D. Ark. 1995) (applying Arkansas law) (insider); In re White Metal Rolling and Stamping Corp., 222 B.R. 417 (Bankr. S.D. N.Y. 1998) (affiliate or insider) (applying New York law).
- 10 Russell County Feed Mill, Inc. v. Kimbler, 520 S.W.2d 309 (Ky. 1975).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers II G Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

G. Reservation of Interest, Right, or Benefit

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#) 🔑 [109](#), [110](#), [112](#), [113](#)

A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#) 🔑 [109](#), [110](#), [112](#), [113](#)

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 33

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

G. Reservation of Interest, Right, or Benefit

§ 33. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  109, 110

A characteristic of a fraudulent conveyance is a reservation of a benefit to the transferor or his or her family.¹ In other words, one may not be the beneficial owner of property and still have it exempt from his or her debts.² In fact, the courts have consistently held that no effort of a debtor to hinder or delay his or her creditors is more severely condemned than an attempt to place the debtor's property where he or she can enjoy it and at the same time require his or her creditors to await for the payment of their claims out of it.³

Whether the transferor receives benefits from the asset after the transfer or retains control over the asset after the transfer is relevant to whether the transfer is fraudulent, but it is not the only pertinent fact, and even though the existence of a continuing legal or financial relationship after the transfer may indicate bad faith, the lack of such a relationship does not establish good faith.⁴

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [U.S. v. Larson](#), 625 F. Supp. 134 (E.D. Wash. 1985); [In re O.P.M. Leasing Services, Inc.](#), 40 B.R. 380 (Bankr. S.D. N.Y. 1984), order aff'd, 44 B.R. 1023 (S.D. N.Y. 1984) (applying Oregon law).
- 2 [Crane, for Use of Niemeyer v. Illinois Merchants Trust Co.](#), 238 Ill. App. 257, 1925 WL 4524 (1st Dist. 1925).
- 3 [Commercial State Sav. Bank v. Bird](#), 254 Mich. 418, 237 N.W. 57 (1931).
- 4 [For Your Ease Only, Inc. v. Calgon Carbon Corp.](#), 560 F.3d 717 (7th Cir. 2009) (applying Illinois law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 34

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

G. Reservation of Interest, Right, or Benefit

§ 34. Trust in behalf of transferor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  109, 110, 112

A conveyance of property in trust for the benefit of the grantor has frequently been held to be invalid,¹ such as where a decedent conveyed property for his or her own benefit² or where a trust to which property is conveyed is the alter ego or nominee of the defendant, and the court finds that the defendant is the true, beneficial owner.³ Although the validity of such conveyances has been upheld in some cases,⁴ it is a general rule that an individual cannot create out of his or her own property, for his or her own benefit, a trust containing assets over which the individual has control and possession and thereby defeat the lawful claims of creditors.⁵ Equally, the debtor's transfer of property to a trust for the benefit of his or her children is a fraudulent conveyance where the debtor retains control over the trust⁶ and also even though a family member is the ostensible trustee.⁷ Thus, transfers of trust assets after the entry of judgment against the debtor are fraudulent conveyances and must be set aside where the evidence establishes that the debtor retained unfettered discretion and control over the assets of a trust; transfers to the trust were made after the instigation of the lawsuit and the debtor, as trustee, transferred funds from the trust to the debtor's own benefit, with many of the transfers following closely on the heels of the entry of judgment.⁸ The defendant's transfer of a limited liability company's sole asset, real estate, from the company to a trust controlled by the defendant and the other individual defendants for the purchase price of \$10, without payment of city and state transfer taxes, and in violation of the terms of the mortgage, is also a fraudulent conveyance⁹ as are transfers to a trust where the intended effect is to shield a debtor's assets from creditors in order to allow him or her additional time to pursue and defend pending litigation.¹⁰ However, transfer of a residence from the debtor to a family trust some six years before guaranteeing the loan and 10 years before filing a petition for bankruptcy, without further evidence that the debtor was experiencing financial difficulties at the time of the transfer, is insufficient indicia of fraud to show that the conveyance was intended to defraud creditors.¹¹ Moreover, a trust created by taxpayers for the benefit of their children is a legal entity separate and apart from the taxpayers, rather than a nominee or alter ego of the settlor, for purposes of determining whether the United States could enforce a tax lien against real estate held by the trust, even though the taxpayer attempted to orchestrate the functioning of the trust so that he maintained influence over its operation, where the taxpayers ceased to enjoy

the benefits or shoulder the burdens of the property after transfer to the trust; the trust paid expenses to maintain the property, received rents, and paid taxes; and, upon dissolution, the intended beneficiaries of the trust received its assets free from any actual or equitable claim against them by the taxpayers.¹² However, transfers of real estate to the trust made with actual intent to defeat a claim and to hinder collection constitute fraudulent conveyances, even though the transfers were made to cancel an antecedent debt, where the loan was made in contravention of the trust's prohibition against loans to settlors, and the parcels were conveyed on the date the creditor, the IRS, informed the settlor that it was about to commence collection proceedings.¹³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Nolan v. Nolan, 218 Pa. 135, 67 A. 52 (1907).
- 2 U.S. v. Schofield, 152 F. Supp. 529 (E.D. Pa. 1957).
- 3 U.S. v. Stinson, 386 F. Supp. 2d 1207 (W.D. Okla. 2005) (applying Oklahoma law).
- 4 Mercantile Trust Co. of Baltimore v. Bergdorf & Goodman Co., 167 Md. 158, 173 A. 31, 93 A.L.R. 1205 (1934).
- 5 U.S. v. Boscaljon, 105 A.F.T.R.2d 2010-1501, 2010 WL 1053688 (D.S.D. 2010) (applying South Dakota law); In re Mastro, 465 B.R. 576 (Bankr. W.D. Wash. 2011) (applying Washington law).
- 6 In re Beatrice, 277 B.R. 439 (Bankr. D. Mass. 2002), aff'd, 296 B.R. 576 (B.A.P. 1st Cir. 2003) (applying Massachusetts law).
- 7 In re Krause, 386 B.R. 785 (Bankr. D. Kan. 2008), decision aff'd, Bankr. L. Rep. (CCH) P 81734, 2010-1 U.S. Tax Cas. (CCH) P 50222, 105 A.F.T.R.2d 2010-731, 2009 WL 5064348 (D. Kan. 2009), aff'd, 637 F.3d 1160 (10th Cir. 2011) (applying Kansas law).
- 8 Comcast of IL X v. Multi-Vision Electronics, Inc., 504 F. Supp. 2d 740 (D. Neb. 2007) (applying Nebraska law).
- 9 Man Choi Chiu v. Chiu, 38 A.D.3d 619, 832 N.Y.S.2d 89 (2d Dep't 2007).
- 10 In re Potter, 2008 WL 5157877 (Bankr. D. N.M. 2008) (applying New Mexico and California law).
- 11 Lakeside Lumber Products, Inc. v. Evans, 2005 UT App 87, 110 P.3d 154 (Utah Ct. App. 2005).
- 12 Sumpter v. U.S., 302 F. Supp. 2d 707 (E.D. Mich. 2004), subsequent determination, 314 F. Supp. 2d 684 (E.D. Mich. 2004) (applying Michigan law).
- 13 Sumpter v. U.S., 302 F. Supp. 2d 707 (E.D. Mich. 2004), subsequent determination, 314 F. Supp. 2d 684 (E.D. Mich. 2004) (applying Michigan law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 35

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

G. Reservation of Interest, Right, or Benefit

§ 35. Trust in behalf of transferor—Secret reservation or trust for grantor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  113

A secret reservation or trust in favor of the grantor in a conveyance of property is a badge of fraud¹ and usually is viewed as being per se fraudulent and void as to creditors.² However, the inference of it being per se fraudulent is not conclusive.³ It still must be shown that the effect of the reservation is to place assets of the transferor out of the reach of his or her creditors⁴ and that the trust or reservation was controlled by the debtor and never operated separately from the debtor's interests.⁵ If the result of the reservation is to defeat the rights of creditors, the transaction is illegal regardless of the actual intention of the parties thereto.⁶ In expanding on this concept, courts have identified an “illusory transfer”—one which takes back all that it gives—and a “colorable transfer”—where the transfer appears absolute on its face, but due to some secret or tacit understanding between the transferee and transferor, it is not transferred because the parties intended ownership to be retained by the transferor.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Alan Drey Co., Inc. v. Generation, Inc.](#), 22 Ill. App. 3d 611, 317 N.E.2d 673 (1st Dist. 1974).
- 2 [Friedel v. Bailey](#), 329 Mo. 22, 44 S.W.2d 9 (1931).
- 3 [Bank of California v. Virtue & Scheck, Inc.](#), 140 Cal. App. 3d 1026, 190 Cal. Rptr. 54 (4th Dist. 1983).
- 4 [Farkas v. Katz](#), 54 F.2d 1061 (C.C.A. 5th Cir. 1932).
- 5 [South Carolina Nat. Bank v. Halter](#), 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987).
- 6 [Farkas v. Katz](#), 54 F.2d 1061 (C.C.A. 5th Cir. 1932).
- 7 [In re Marriage of Frederick](#), 218 Ill. App. 3d 533, 161 Ill. Dec. 254, 578 N.E.2d 612 (2d Dist. 1991).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 36

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

H. Retention of Possession of Property

1. In General

§ 36. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  131 to 146(3)

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 142, 143](#) (Jury instructions—Change of possession as prerequisite to valid transfer)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 144](#) (Jury instructions—Retention of possession as evidence of fraud)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 146](#) (Jury instructions—Good faith as jury question where possession retained by transferor)

The law of fraudulent conveyances seeks to avoid a deceptive appearance of ownership through a debtor's retention of possession after title to the property has passed to a stranger.¹ Accordingly, the courts follow a general rule that a transferor's retention of all or some of his or her property,² or the use and enjoyment of property,³ or the transferor's retention of the possession, benefit,⁴ or use of the property after a conveyance or transfer of real⁵ or personal⁶ property, assets,⁷ property of a business,⁸ estate interest,⁹ or an absolute sale, is a classic indication of a fraudulent conveyance¹⁰ in the absence of any valid reason. At the very least, it is clearly a consideration as to whether or not a fraudulent conveyance occurred.¹¹

The transfer of the debtor's assets to a family member, where the debtor retains control¹² and possession¹³ or continues to use the property and treat it as his or her own,¹⁴ is an indication of a fraudulent conveyance. Also, the transfer of the debtor's assets to a limited liability company, controlled by the spouse of the owner of the debtor, also supports the finding of a fraudulent conveyance where the company pays the owner a salary and provides him and his spouse with payment of numerous expenses, in return for which the debtor provides minimal services.¹⁵ However, the mere fact that the debtor's agent retains possession of real property following the debtor's sale to a company controlled by the agent does not establish that the debtor maintained possession or control of the units following transfer where the creditor does not allege that the agent's retention of the property allowed the debtor to retain any degree of possession or control over the units, and the creditor does not explain how the agent's retention of the property indicates the creditor's fraudulent intent.¹⁶

Practice Tip:

A judgment creditor states causes of action under fraudulent conveyance statutes by alleging that the defendant fraudulently transferred assets from judgment debtors to family members and corporations, which were allegedly under the exclusive control of the defendant and another individual, and that those transfers rendered the judgment debtors insolvent and were undertaken with the intent to hinder the creditor's rights as a judgment creditor.¹⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Graves Const. Co., Inc. v. Rockingham Nat. Bank](#), 220 Va. 844, 263 S.E.2d 408, 28 U.C.C. Rep. Serv. 588 (1980).
- 2 [U.S. v. West](#), 299 F. Supp. 661 (D. Del. 1969).
- 3 [U.S. v. Engh](#), 330 F.3d 954 (7th Cir. 2003) (applying Illinois law).
- 4 [Eyler v. C.I.R.](#), 760 F.2d 1129 (11th Cir. 1985).
- 5 [S.E.C. v. Whitworth Energy Resources Ltd.](#), 26 Fed. Appx. 723 (9th Cir. 2002) (applying California law); [Grochocinski v. Schlossberg](#), 402 B.R. 825 (N.D. Ill. 2009) (debtor retained beneficial ownership of residence); [Langaa v. Pauer](#), 2005-Ohio-6296, 2005 WL 3150251 (Ohio Ct. App. 11th Dist. Geauga County 2005) (conveyance of home to daughter); [Garcia v. Guerrero](#), 2010 WL 183480 (Tex. App. San Antonio 2010).
- 6 [Superior Partners v. Professional Educ. Network, Inc.](#), 138 Ill. App. 3d 226, 93 Ill. Dec. 8, 485 N.E.2d 1218 (1st Dist. 1985).
- 7 [Hassett v. Goetzmann](#), 10 F. Supp. 2d 181 (N.D. N.Y. 1998) (applying New York law).
- 8 [U.S. v. Harrison](#), 366 B.R. 656 (S.D. Tex. 2007), motion for stay pending appeal denied, 99 A.F.T.R.2d 2007-2748, 2007 WL 1428635 (S.D. Tex. 2007) and judgment aff'd, 273 Fed. Appx. 315 (5th Cir. 2008) (applying Texas law; debtor's continued use of property after transfer of business assets to an employee with questionable funds); [In re Seitz](#), 400 B.R. 707 (Bankr. E.D. Mo. 2008) (applying Missouri law); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
Some courts have held, however, that a debtor may hold on to the property of a business for a commercially reasonable time. [In re Fritz-Mair Mfg. Co.](#), 16 B.R. 417, 33 U.C.C. Rep. Serv. 554 (Bankr. N.D. Tex. 1982).

- 9 Cardiovascular & Thoracic Surgery of Canton, Inc. v. DiMazzio, 37 Ohio App. 3d 162, 524 N.E.2d 915 (5th
Dist. Stark County 1987) (debtor retained life estate).
- 10 In re Roberts, 81 B.R. 354 (Bankr. W.D. Pa. 1987).
- 11 Clark v. Bank of Bentonville, 308 Ark. 241, 824 S.W.2d 358 (1992).
- 12 Cadle Co. v. Newhouse, 74 Fed. Appx. 152 (2d Cir. 2003) (applying New York law; transferor retained
power of attorney to withdraw funds from bank account).
- 13 In re Schofield-Johnson, LLC, 462 B.R. 539 (Bankr. M.D. N.C. 2011) (applying North Carolina law; transfer
of judgment proceeds).
- 14 U.S. v. Harrison, 366 B.R. 656 (S.D. Tex. 2007), motion for stay pending appeal denied, 99 A.F.T.R.2d
2007-2748, 2007 WL 1428635 (S.D. Tex. 2007) and judgment aff'd, 273 Fed. Appx. 315 (5th Cir. 2008)
(applying Texas law).
- 15 In re Dealers Agency Services, Inc., 380 B.R. 608 (Bankr. M.D. Fla. 2007) (applying Florida law).
- 16 Schempp v. Lucre Management Group, LLC, 75 P.3d 1157 (Colo. App. 2003).
- 17 320 West 13th Street, LLC v. Wolf Shevack, Inc., 85 A.D.3d 629, 926 N.Y.S.2d 77 (1st Dep't 2011).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 37

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

H. Retention of Possession of Property

1. In General

§ 37. Simulated sales

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  131 to 146(3)

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 144, 145](#) (Instructions to jury—Retention of possession as evidence of fraud)

An example of an unlawful retention¹ is a simulated sale or as it is sometimes referred to as a "non-transfer simulation."² This type of "sale" occurs where the debtor does not transfer property, despite the representation of a transfer. In reality, the transaction is a sham and, as a result, an absolute nullity³ that may be declared null at any time at the demand of any person in interest.⁴ The simulation is absolute when the parties intend that their contract shall produce no effects between them.⁵ An absolute simulation cannot defeat good faith creditors and bona fide purchasers who rely on the public record of the contract.⁶ In contrast, a relative simulation is one in which the parties intend that the contract produce effects that are different from those recited in their contract.⁷

The retention of possession after an absolute sale is not enough to find a violation.⁸ There must also be proof that the transferor, in addition to retaining possession, continued to receive income from the property conveyed. This situation would suggest that the conveyance was fraudulent⁹ or that the transferor had an interest in the entity to which he or she transferred the property

which, coupled with other circumstances, can create a fraudulent conveyance.¹⁰ Moreover, a lease back of property sold by the debtor does not establish a simulation where valuable consideration was given for the property, and the leases were valid.¹¹

Observation:

The children of transferees are not protected third parties under the law of registry, in an action brought by the transferor who alleged that the sales of immovable properties to the transferees were simulations, and the children were bound by any promises of the transferees to return to the transferor the record title as the children's acceptance of their parents' successions obligated them for the mutual agreement of their parents' simulation.¹²

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 §§ 36 to 38.
- 2 Sabrier v. Leard, 426 So. 2d 213 (La. Ct. App. 4th Cir. 1982).
- 3 Johnson v. Unopened Succession of Alfred Covington, Jr., 969 So. 2d 733 (La. Ct. App. 2d Cir. 2007).
- 4 Hutsen v. Davis, 983 So. 2d 266 (La. Ct. App. 3d Cir. 2008).
- 5 Miller v. Jackson, 80 So. 3d 673 (La. Ct. App. 3d Cir. 2011).
- 6 KeyBank Nat. Ass'n v. Perkins Rowe Associates, LLC, 823 F. Supp. 2d 399 (M.D. La. 2011) (applying Louisiana law).
- 7 Mathews v. Mathews, 1 So. 3d 738 (La. Ct. App. 2d Cir. 2008).
- 8 Twin Ports Oil Co. v. Whiteside, 218 Minn. 78, 15 N.W.2d 125 (1944).
- 9 Cleveland Trust Co. v. Foster, 93 So. 2d 112 (Fla. 1957).
- 10 F.D.I.C. v. Proia, 663 A.2d 1252 (Me. 1995).
- 11 Entergy Louisiana, Inc. v. Kennedy, 859 So. 2d 74 (La. Ct. App. 1st Cir. 2003), writ denied, 858 So. 2d 430 (La. 2003).
- 12 Sonnier v. Conner, 998 So. 2d 344 (La. Ct. App. 2d Cir. 2008), writ denied, 6 So. 3d 773 (La. 2009).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 38

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

II. Elements, Factors, and Requisites

H. Retention of Possession of Property

2. Requisites as to, and Sufficiency of, Delivery or Change of Possession

§ 38. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  147 to 153

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 51](#) (Complaint—Allegation—Possession of described real property by transferee)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 115](#) (Jury instructions—Definition of transfer)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 142](#) (Jury instructions—Change of possession as prerequisite to valid transfer)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 149](#) (Jury instructions—Property in possession of third party)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 150](#) (Jury instructions—Transfer of bill of lading as sufficient delivery)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 151](#) (Jury instructions—Necessity for actual delivery of growing crops)

Unless the goods sold are of such a nature as to make actual delivery impossible, there must be an actual delivery, transfer,¹ diminution in assets,² or a conveyance of goods³ unless otherwise permitted by law. The delivery or transfer should not impair the rights of creditors,⁴ or else, it is subject to a presumption of fraud and invalidity as to the creditors of the transferor.⁵ In other words, to effectuate a transfer or conveyance, the situation cannot be one in which the debtor treats the property in exactly the

same manner after the transfer as he or she did before that time.⁶ Delivery of property is one factor in showing that a conveyance is not actually a simulated contract⁷ or a fraudulent conveyance.⁸ Similarly, a transfer to a third person will not suffice, if it is made to a third person who merely serves as a conduit to the transferor, where the transferee subsequently reconveys the property back to the debtor or where the debtor still had access to and use of the property.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [In re Checkmate Stereo and Electronics, Ltd.](#), 9 B.R. 585 (Bankr. E.D. N.Y. 1981), [aff'd](#), 21 B.R. 402, 11 Fed. R. Evid. Serv. 78, 34 Fed. R. Serv. 2d 1177 (E.D. N.Y. 1982).
A "transfer" does not occur when the property conveyed remains available to the debtor after the transfer. [Gagan v. Gouyd](#), 73 Cal. App. 4th 835, 86 Cal. Rptr. 2d 733 (4th Dist. 1999) (disapproved of on other grounds by, [Mejia v. Reed](#), 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (2003)).
- 2 [Comjean v. Cruickshank](#), 191 B.R. 504 (D. Mass. 1995).
- 3 [In re Harper](#), 132 B.R. 349 (Bankr. S.D. Ohio 1991) (applying Ohio law).
- 4 [Tcherepnin v. Franz](#), 475 F. Supp. 92 (N.D. Ill. 1979) (applying Illinois law).
- 5 [Hawes v. Central Texas Production Credit Ass'n](#), 503 S.W.2d 234 (Tex. 1973).
- 6 [F.P.P. Enterprises v. U.S.](#), 830 F.2d 114 (8th Cir. 1987).
- 7 [Thornton v. Wolf](#), 958 So. 2d 131 (La. Ct. App. 3d Cir. 2007).
- 8 [In re M. Fabrikant & Sons, Inc.](#), 394 B.R. 721 (Bankr. S.D. N.Y. 2008) (applying New York law).
- 9 [In re Saylor](#), 178 B.R. 209 (B.A.P. 9th Cir. 1995), [decision aff'd](#), 108 F.3d 219 (9th Cir. 1997) (applying California law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers III A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#) 🔑2281

West's Key Number Digest, [Fraudulent Conveyances](#) 🔑15, 23 to 28, 30, 32, 38, 40, 41, 43(3), 45, 48, 49(.5), 54(1), 57(5), 64(1), 74(2), 76(1), 81, 88, 104(4), 105, 146(2), 166, 172(1), 298(1), 299(2)

West's Key Number Digest, Husband and Wife 🔑14.11

West's Key Number Digest, [Wills](#) 🔑717(1), 867

A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, Corporations and Business Organizations 🔑2281

West's A.L.R. Digest, [Fraudulent Conveyances](#) 🔑15, 23 to 28, 30, 32, 38, 40, 41, 43(3), 45, 48, 49(.5), 54(1), 57(5), 64(1), 74(2), 76(1), 81, 88, 104(4), 105, 146(2), 166, 172(1), 298(1), 299(2)

West's A.L.R. Digest, Husband and Wife 🔑14.11

West's A.L.R. Digest, [Wills](#) 🔑717(1), 867

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 39

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 39. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  23

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 5](#) (Complaint, petition, or declaration—To set aside fraudulent transfer)

The terms of the fraudulent transfer statutes are broad enough to include every transaction by which creditors or others may be defrauded; it is not the nature of the transaction but the presence of fraud which brings the case within the prohibition of the statutes.¹ Generally, any conveyance of property may be vitiated by fraud, and the form of the transfer is not controlling.² Many devices and instruments have been resorted to for the purpose of covering up fraud, but whenever the law is invoked, they are declared to be nullities; the law looks on them as if they had never been executed.³

Observation:

A fraudulent transfer claim cannot succeed where the defendant held no title to the property and was not a debtor.⁴

Charitable payments made by a debtor during the course of a Ponzi scheme can constitute a fraudulent conveyance.⁵ When investors invest in a Ponzi scheme, any payments that they receive in excess of their principal investments constitute fraudulent conveyances.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Southern Lumber Co. v. Riley, 224 Ark. 298, 273 S.W.2d 848 \(1954\).](#)
- 2 [Harris v. Wagshal, 343 A.2d 283 \(D.C. 1975\).](#)
- 3 [McGahee v. McGahee, 204 Ga. 91, 48 S.E.2d 675 \(1948\).](#)
- 4 [Altman v. PNC Mortg., 850 F. Supp. 2d 1057 \(E.D. Cal. 2012\) \(applying California law; involving a bank's assignment of a mortgage loan\).](#)
- 5 [In re C.F. Foods, L.P., 280 B.R. 103 \(Bankr. E.D. Pa. 2002\) \(applying Pennsylvania law\).](#)
- 6 [In re Bernard L. Madoff Inv. Securities LLC, 454 B.R. 317 \(Bankr. S.D. N.Y. 2011\) \(applying New York law\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 40

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 40. Definition of transfer; fraudulent transfer

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  24 to 27

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 115](#) (Jury instructions—Definition of transfer)

Before there can be a "fraudulent transfer" within the meaning of the Uniform Fraudulent Transfer Act, there must be a "transfer."¹ A "transfer" includes both the incurrence of an obligation and any payments on an obligation.² The Uniform Fraudulent Transfer Act defines "transfer" as every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance.³ Thus, the threshold determination to be made under the Uniform Fraudulent Transfer Act is whether a transfer occurred at all, which, in turn, is dependent upon whether any of the items purportedly transferred constitute "assets."⁴

A "fraudulent transfer" is a voluntary transfer made or an obligation incurred with the actual intent to hinder, delay, or defraud a creditor, whether the creditor's claim arose before or after the transfer or obligation.⁵ It is intended to cover any transaction whereby a transferor divested him- or herself, directly or indirectly, of any cognizable interest, legal or equitable, in property of a transferor.⁶

"Collapsing doctrine" is essentially an equitable doctrine allowing a court faced with a fraudulent conveyance claim to dispense with the structure of a transaction or series of transactions.⁷ Indeed, the fraudulent conveyance doctrine is a flexible principle that

looks to substance rather than form.⁸ In order to collapse two transactions and treat them as a single transaction under fraudulent conveyance law, a plaintiff must establish: (1) either that the transactions were linked⁹ or that a party gave the debtor fair value in exchange for the debtor's property, but the debtor then gratuitously reconveyed what it received to a third party, taking nothing in return,¹⁰ and (2) the party to the transaction with the debtor that is sought to be avoided had actual or constructive knowledge of the entire scheme that renders its exchange with the debtor fraudulent.¹¹ The knowledge required for collapsing is knowledge of the multiple, integrated layers of the transaction rather than knowledge of any fraud or voidability.¹²

For a transaction to be considered fraudulent, the transfer must have been "voluntary."¹³

The ratification of a former transaction is not a conveyance within the meaning of a state's Fraudulent Transfer Act, where, by the time the parties executed such an agreement, the conveyance has already been completed.¹⁴ Moreover, no transfer of any interest in property occurs as a result of the debtor company's disclosure of a customer list, of the kind which could be avoided as a fraudulent transfer.¹⁵

Observation:

Although the Uniform Fraudulent Conveyances Act has been superseded by the Uniform Fraudulent Transfer Act, it is still in effect in some states. This Act contains no definition of transfer but does define "conveyance" as every payment of money; assignment, release, transfer, lease, mortgage, or pledge of tangible or intangible property; and also the creation of any lien or incumbrance.¹⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 In re Horob Livestock Inc., 382 B.R. 459 (Bankr. D. Mont. 2007) (applying North Dakota law).
- 2 In re Omega Door Co., Inc., 399 B.R. 295 (B.A.P. 6th Cir. 2009) (applying Ohio law).
- 3 Unif. Fraudulent Transfer Act § 1(12).
- 4 In re Wintz Companies, 230 B.R. 848 (B.A.P. 8th Cir. 1999).
- 5 In re Nowicki, 202 B.R. 729 (Bankr. N.D. Ill. 1996).
- 6 In re Crawford, 172 B.R. 365 (Bankr. M.D. Fla. 1994).
- 7 Jahn v. F.D.I.C., 828 F. Supp. 2d 305 (D.D.C. 2011); In re Bachrach Clothing, Inc., 2012 WL 4838998 (Bankr. N.D. Ill. 2012) (applying Illinois law).
- 8 Boyer v. Crown Stock Distribution, Inc., 587 F.3d 787 (7th Cir. 2009) (applying Indiana law).
- 9 Frank Sawyer Trust of May 1992 v. C.I.R., T.C. Memo. 2011-298, T.C.M. (RIA) P 2011-298 (2011) (applying Massachusetts law).
- 10 In re M. Fabrikant & Sons, Inc., 394 B.R. 721 (Bankr. S.D. N.Y. 2008) (applying New York law).
- 11 In re M. Fabrikant & Sons, Inc., 394 B.R. 721 (Bankr. S.D. N.Y. 2008) (applying New York law); Frank Sawyer Trust of May 1992 v. C.I.R., T.C. Memo. 2011-298, T.C.M. (RIA) P 2011-298 (2011) (applying Massachusetts law).
- 12 In re CNB Intern., Inc., 440 B.R. 31 (W.D. N.Y. 2010) (applying New York law).
- 13 Butler v. NationsBank, N.A., 58 F.3d 1022, 27 U.C.C. Rep. Serv. 2d 916 (4th Cir. 1995).

- 14 [In re Vargas Realty Enterprises, Inc.](#), 440 B.R. 224 (S.D. N.Y. 2010) (applying New York law).
15 [In re M. Silverman Laces, Inc.](#), 404 B.R. 345 (Bankr. S.D. N.Y. 2009) (applying New York law).
16 Unif. Fraudulent Conveyance Act § 1.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 41

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 41. Exchange of property; conversion of nonexempt into exempt property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  38

Conversion of nonexempt property to exempt property can provide the basis for a fraudulent conveyance claim.¹

Under the Uniform Fraudulent Transfer Act, the mere conversion of nonexempt assets to exempt assets is not in itself fraudulent as to creditors.² Thus, a debtor who converts nonexempt assets into exempt assets to find shelter in the exemption statutes must have an actual intent to defraud creditors in order to be found to have perpetrated a fraud on his or her creditors.³ Before actual fraudulent intent can be found, there must appear in the evidence some facts or circumstances which are extrinsic to the mere fact of conversion and which are indicative of a fraudulent purpose.⁴ Thus, purposeful conversion of nonexempt funds into exempt funds immediately prior to bankruptcy or threatened execution by a judgment creditor is not fraudulent per se; it is only one indication of fraud.⁵

Although a creditor can avoid a fraudulent conversion of nonexempt property into statutorily created exempt property, a creditor cannot avoid the transfer of nonexempt funds into constitutionally created exempt property, such as a homestead; statutory exemptions are subject to avoidance under the statutes, but constitutional exemptions are not subject to statutory avoidance.⁶

CUMULATIVE SUPPLEMENT

Cases:

While Chapter 7 debtors' fraudulent conversion of nonexempt assets into exempt equity in homestead by paying down residential mortgage loan triggered statutory limitation on debtors' Nevada homestead exemption rights, it did not authorize bankruptcy court to surcharge debtors' homestead in amount of paydown or to direct sale of homestead property so that trustee could recover

amount of surcharge for benefit of unsecured creditors; rather, as long as debtors remained current on their mortgage loan, they would likely be able to retain homestead. 11 U.S.C.A. § 522(o). *In re Tarkanian*, 562 B.R. 424 (Bankr. D. Nev. 2014).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [In re Fischer](#), 411 B.R. 247 (Bankr. D. Md. 2009) (applying Maryland law).
- 2 [In re Sholdan](#), 217 F.3d 1006 (8th Cir. 2000); [In re Simms](#), 243 B.R. 156 (Bankr. S.D. Fla. 2000).
- 3 [In re Channon](#), 424 B.R. 895 (Bankr. D. N.M. 2010) (applying New Mexico law).
- 4 [In re Sholdan](#), 217 F.3d 1006 (8th Cir. 2000); [In re Simms](#), 243 B.R. 156 (Bankr. S.D. Fla. 2000).
- 5 [Dona Ana Sav. and Loan Ass'n, F.A. v. Dofflemeyer](#), 115 N.M. 590, 855 P.2d 1054 (1993).
As to whether exempt property may be subject to a fraudulent conveyance, see § 74.
- 6 [In re Potter](#), 320 B.R. 753 (Bankr. M.D. Fla. 2005) (applying Florida law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 42

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 42. Debtor's gratuitous performance of services

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  24(1), 43(3)

While a debtor may not give away property to the prejudice of his or her creditors, a debtor may give away labor, and the donee may not be in any way charged therewith by the donor's creditors.¹ It is not fraud, or a fraudulent transfer, to donate services.² However, some of the decisions indicate that the donation by a debtor of time and talents is in effect a voluntary settlement of the products thereof and fraudulent as to his or her creditors.³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Studds v. Fidelity & Deposit Co. of Md.](#), 267 F.2d 875 (4th Cir. 1959).
- ² [Overocker v. Solie](#), 597 N.W.2d 579 (Minn. Ct. App. 1999).
- ³ [Brooks Waterfield Co. v. Frisbie](#), 99 Ky. 125, 18 Ky. L. Rptr. 555, 35 S.W. 106 (1896).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 43

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions


A. In General

§ 43. Investment in, or transfer of individual assets to, estate by entireties

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  24(1), 54(1), 57(5), 146(2)

West's Key Number Digest, Husband and Wife  14.11

A.L.R. Library

[Use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on, property held in estate by entireties as a fraud upon creditors, 7 A.L.R.2d 1104](#)

Under the rule that an estate by the entireties or the interest of either spouse is not liable for the separate debts of either spouse or is liable for them only to a limited extent, one may effectually convert individual assets into property held by entireties where there are no existing creditors or where there is sufficient individual property to meet their claims.¹ On the other hand, when a debtor places property in an entireties estate while insolvent, or when the transfer renders the debtor insolvent, the debtor commits a fraud upon creditors, and the transfer may be invalidated as a fraudulent conveyance and set aside² unless the deposited funds are spent on necessities.³ This is true without regard to actual intent.⁴

Payment by an insolvent debtor to enhance property held by the entireties, or a payment used to create property held by the entireties, is also fraudulent as to creditors.⁵

If there exists an actual intent (as distinguished from an intent presumed in law) to hinder, delay, or defraud either present or future creditors, the application of individual assets to an estate by the entireties is voidable at the application of either type of creditor regardless of solvency.⁶

The transfer of real property from a debtor to himself and his wife as tenants by the entirety is not fraudulent as to the creditor where the creditor cooperated with the restructuring of debt with respect to the property.⁷ However, where creditors knew that the money being borrowed by the insolvent was going to improve certain property, but did not know that the property was held by the insolvent and a spouse as tenants by the entirety, such property was not beyond the reach of creditors.⁸

Where the original transfer into entirety status is not fraudulent, a subsequent transfer of entirety property is not avoidable as a fraudulent transfer unless there were joint creditors who could have reached the property.⁹

Moreover, the transfer of entirety property that is encumbered by a judicial lien that is the result of a judgment against only one of the entirety spouses cannot constitute a fraudulent conveyance, not even if this transfer is from the two entirety tenants to just one of them or is accompanied by actual fraudulent intent.¹⁰

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Lunnen v. Hunter](#), 348 Pa. 402, 35 A.2d 292 (1944).
As to antenuptial conveyances resulting in the spouses becoming tenants by the entirety, see § 53.
- 2 [In re Greenfield](#), 249 B.R. 856 (Bankr. E.D. Mich. 2000), *aff'd*, 273 B.R. 128 (E.D. Mich. 2002), *aff'd*, 65 Fed. Appx. 549 (6th Cir. 2003); [In re Laines](#), 352 B.R. 397 (Bankr. E.D. Va. 2005) (applying Virginia law).
- 3 [Cardiello v. Arbogast](#), 479 B.R. 661 (W.D. Pa. 2012) (applying Pennsylvania law).
The term "necessities," for constructive fraudulent transfer avoidance purposes, could not be equated with any purchases other than for luxury goods or services. [In re Arbogast](#), 466 B.R. 287 (Bankr. W.D. Pa. 2012), *aff'd*, 479 B.R. 661 (W.D. Pa. 2012) (applying Pennsylvania law).
- 4 [Glazer v. Beer](#), 343 Mich. 495, 72 N.W.2d 141 (1955).
- 5 [In re Harlin](#), 321 B.R. 836 (E.D. Mich. 2005) (applying Michigan law).
- 6 [Amadon v. Amadon](#), 359 Pa. 434, 59 A.2d 135 (1948).
- 7 [Premier Capital, Inc. v. Klein](#), 7 A.D.3d 501, 776 N.Y.S.2d 74 (2d Dep't 2004).
- 8 [Glazer v. Beer](#), 343 Mich. 495, 72 N.W.2d 141 (1955).
- 9 [In re Delson](#), 247 B.R. 873 (Bankr. S.D. Fla. 2000).
- 10 [In re Clawson](#), 359 B.R. 118 (Bankr. W.D. Pa. 2007) (applying Pennsylvania law).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 44

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 44. Conveyance or encumbrance of estate by entireties

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#) 🔑24(1), 45, 49(.5), 105

West's Key Number Digest, Husband and Wife 🔑14.11

A.L.R. Library

[Use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on, property held in estate by entireties as a fraud upon creditors, 7 A.L.R.2d 1104](#)

Where a husband's interest in property held by the entireties is not regarded as subject to execution by his creditors during the joint lives of the spouses, the view has been taken that a conveyance of the property by the spouses is not open to attack as in fraud of creditors of the husband even though the purpose of the conveyance is to place the property beyond the reach of such creditors in the event that he survives his wife.¹ On the other hand, in jurisdictions where a husband's interest in an estate by the entireties is subject to execution by his creditors during the joint lives of the spouses, a conveyance of the entirety property by both of them will be subject to attack by creditors of the husband so far as his interest is concerned.² In some jurisdictions, the transfer of entireties property from a debtor to his wife may be avoidable as a fraudulent transfer if, at the time of the transfer, there were joint creditors who could have reached the entireties property.³

With respect to property divisions that result from divorce, the distribution of property to the debtor's former wife in the dissolution decree, after commencement of an action against the debtor, is deemed a "transfer" by some courts, within the meaning of the Uniform Fraudulent Transfer Act, even though the division results from a trial rather than a settlement agreement.⁴ On the other hand, it has been held that property held by spouses as tenants by the entirety, which is later disposed

of in a divorce judgment, is not subject to the Uniform Fraudulent Transfer Act where such an action would not reach the property unless both spouses were debtors on the claim that was the subject of the action as such property was exempt from claims of the creditors of only one spouse.⁵

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Ellis v. Ashby, 227 Ark. 479, 299 S.W.2d 206 \(1957\).](#)
- 2 [Rothschild v. Lincoln Rochester-Trust Co, 212 F.2d 584 \(2d Cir. 1954\).](#)
- 3 [In re Delson, 247 B.R. 873 \(Bankr. S.D. Fla. 2000\).](#)
- 4 [Canty v. Otto, 304 Conn. 546, 41 A.3d 280 \(2012\).](#)
- 5 [Estes v. Titus, 481 Mich. 573, 751 N.W.2d 493 \(2008\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 45

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 45. Transfer of assets to corporation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  2281

West's Key Number Digest, [Fraudulent Conveyances](#)  15, 26(1), 41

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 77](#) (Complaint, petition, or declaration—Debtor's business assets transferred to newly formed corporation controlled by debtor with intent to defraud creditors)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 79](#) (Complaint, petition, or declaration—Under Uniform Fraudulent Transfer Act and similar statutes—Debtor's business assets transferred to newly formed corporation controlled by debtor with intent to defraud creditors)

The transfer of a business to a wholly owned corporation is not a fraudulent transfer absent evidence of intent to hinder, delay, or defraud creditors¹ or evidence that the transferors were engaged in a transaction for which their remaining assets were unreasonably small or that the transferors intended to incur debts beyond their ability to pay as they became due.² Such a transaction is, in substance, a transfer by the debtor to him- or herself.³ For example, judgment debtors fraudulently conveyed property to corporations where the judgment debtors were owners and sole stockholders of the corporations at the time of the transfer; the corporations had knowledge of the litigation involving the debtors; although the debtors had some property of value after the transfer, the value of the remaining property did not approach the amount of the judgments; the debtors did not receive consideration for the transfer to one corporation; and the debtors transferred shares in the corporations to their children as part of an alleged "estate plan."⁴ Also, transfers of real property to a nominee/alter ego corporation sole that are made with the actual intent to defraud are voidable.⁵

Although a transfer to an affiliated corporation alone is not dispositive of a fraudulent intent,⁶ the fact that the debtor's property was transferred to a corporation which was organized, owned, or controlled by the debtor will generally lead to the conclusion that the transaction was fraudulent as to creditors.⁷

An assignment from one corporation to another has been considered fraudulent as to a creditor where the directors and stockholders of the corporation were interlocking and where the financial condition of the assignor was precarious.⁸

The fact that a partnership transfers its property to a corporation organized by the partners for the purpose of carrying on the old business is not of itself evidence on the issue of fraud,⁹ but the insolvency of the partnership at the time of the transfer has an important, but not conclusive, bearing on that issue.¹⁰

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 In re Bendetti, 131 Fed. Appx. 224 (11th Cir. 2005) (applying Florida law).
- 2 Park v. Fortune Partner, Inc., 279 Ga. App. 268, 630 S.E.2d 871 (2006).
- 3 Knowles v. Magic City Grocery, 144 Fla. 78, 197 So. 843 (1940).
- 4 City of Arkansas City v. Anderson, 243 Kan. 627, 762 P.2d 183 (1988).
- 5 U.S. v. Black, 725 F. Supp. 2d 1279 (E.D. Wash. 2010), *aff'd*, 2012-1 U.S. Tax Cas. (CCH) P 50364, 109 A.F.T.R.2d 2012-2282, 2012 WL 1929916 (9th Cir. 2012) (applying Washington law).
- 6 In re Schofield-Johnson, LLC, 462 B.R. 539 (Bankr. M.D. N.C. 2011) (applying North Carolina law).
- 7 U.S. v. Black, 725 F. Supp. 2d 1279 (E.D. Wash. 2010), *aff'd*, 2012-1 U.S. Tax Cas. (CCH) P 50364, 109 A.F.T.R.2d 2012-2282, 2012 WL 1929916 (9th Cir. 2012) (applying Washington law).
- 8 Banner Const. Corp. v. Arnold, 128 So. 2d 893 (Fla. 1st DCA 1961).
- 9 Sponholtz v. Sponholtz, 190 So. 2d 572 (Fla. 1966).
- 10 Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co., 23 S.D. 221, 121 N.W. 620 (1909).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 46

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 46. Purchase or holding of property in name of third person

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  15, 24(1), 40

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 27](#) (Complaint, petition, or declaration—To set aside fraudulent transfer—By administrator of estate of transferor—To impress trust on funds deposited in savings account in name of transferee)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 84](#) (Complaint, petition, or declaration—Transfer through dummy grantee to transferor's spouse with intent to defraud creditors)

A debtor may not transfer his or her property to the name of a third person for the debtor's or debtor's family's use to the exclusion of his or her creditors.¹ Nor may a debtor, to the prejudice of creditors, transfer property to another to be held in trust for him or her.² In such a case, the debtor remains the real owner, and the property may be subjected to the payment of his or her debts.³ No inherent difference exists between the act of a debtor conveying his or her property to another without consideration and that of a debtor causing title to property purchased to be placed in the name of another where the object of such a transfer is to hinder, delay, or defraud creditors.⁴ An unrecorded unwritten side agreement between the debtor and the transferee that conceals the debtor's true interest in the transaction, i.e., to retain an equity interest in the property, supports a finding that the conveyance is fraudulent.⁵ Accordingly, when property is purchased by a debtor and title is taken in the name of another to avoid creditors, a deed may be set aside as a fraudulent conveyance.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 In re Weeden, 306 B.R. 449 (Bankr. W.D. N.Y. 2004) (applying New York law).
- 2 § 34.
- 3 Matthews v. Boise City National Bank, 40 Idaho 437, 233 P. 998 (1925).
- 4 D. H. R. Const. Co., Inc. v. Donnelly, 180 Conn. 430, 429 A.2d 908 (1980).
- 5 Grochocinski v. Schlossberg, 402 B.R. 825 (N.D. Ill. 2009) (applying Illinois law).
- 6 In re Lee, 223 B.R. 594 (Bankr. M.D. Fla. 1998).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 47

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 47. Creation of debt, obligation, or encumbrance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  27, 166, 172(1), 298(1), 299(2)

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 75](#) (Complaint, petition, or declaration—Where transfer made in the form of execution of mortgage for contemporaneous loan to creditor having knowledge of debtor's fraudulent intent)

Under the terms of the Uniform Fraudulent Transfer Act, a transfer includes the creation of a lien or other encumbrance.¹

Practice Tip:

Actual or imputed fraudulent intention must be established by one who seeks to have the transaction set aside.²

A mortgage which is given by a mortgagor with the intent to delay or defraud his or her creditors, although given for an actual contemporaneous loan, may be set aside if the mortgagee participates in the fraudulent purpose,³ but where the mortgagee acts in good faith, without notice or reason to believe that the mortgagor intends to defraud the creditors, the mortgage will be sustained as against the creditors.⁴ If an instrument is executed in good faith, but the parties, by their subsequent treatment of it and the property covered by it, give it a fraudulent operation, it may be declared invalid from the time when the fraudulent purpose is promoted.⁵

Observation:

State statutes declaring certain "fraudulent loans" void do not apply to a lease of tangible personal property.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Unif. Fraudulent Transfer Act § 1\(12\).](#)
Note that under the Uniform Fraudulent Conveyance Act, which still applies in some states, a conveyance also is defined to include the creation of any lien or incumbrance. Unif. Fraudulent Conveyance Act § 1.
- 2 [Berger v. Loomis, 169 Or. 575, 131 P.2d 211, 144 A.L.R. 636 \(1942\).](#)
- 3 [Bank of Berwick v. George Vinson Shingle & Mfg. Co., Ltd., 124 La. 1000, 50 So. 823 \(1909\).](#)
- 4 [German-American Bank v. Scherrer, 102 Wis. 582, 78 N.W. 782 \(1899\).](#)
- 5 [Sabin v. Wilkins, 31 Or. 450, 48 P. 425 \(1897\).](#)
- 6 [In re Ludlum Enterprises, Inc., 510 F.2d 996 \(5th Cir. 1975\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 48

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 48. Creation of debt, obligation, or encumbrance— Mortgage exceeding amount due from debtor to creditor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  15, 64(1), 74(2), 76(1), 88

While a mortgage which has been executed to secure an amount in excess of the mortgagor's debt to the mortgagee is considered by some of the authorities to be fraudulent and invalid as to creditors,¹ generally, the excessiveness of security is one circumstance to be considered in determining whether the giving and receiving of such security constituted a transfer in fraud of creditors, along with other circumstances, such as whether the security embraced all the property of the debtor and whether either or both of the parties intended to delay or defeat other creditors.² In addition, the giving and taking of excessive security in itself generally does not constitute a badge of fraud, especially where there is an adequate explanation, as where the exact value of the chose in action assigned was difficult to determine.³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Standard Acc. Ins. Co. v. Hancock](#), 124 Fla. 725, 169 So. 617 (1936).
- ² [In re Rasmussen's Estate](#), 238 Wis. 334, 298 N.W. 172, 138 A.L.R. 1045 (1941).
- ³ [Jones v. Krueger](#), 1 Wis. 2d 27, 82 N.W.2d 910 (1957).
As to conveyance of amount in excess of indebtedness, see [§ 68](#).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 49

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 49. Suffering or confessing judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  15, 30

Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 76](#) (Complaint, petition, or declaration—Confession of judgment by debtor—Intent to defraud creditors)

Among the many forms of transaction which may be within the purview of the statutes invalidating fraudulent conveyances is a judgment against the debtor.¹ The creation of an obligation by a debtor's confession of judgment may be fraudulent as to creditors² as, for example, where the debt is shown to have been fictitious.³

A former husband's confession of judgment in favor of a third party to whom he was indebted at a time when he was in arrears for mortgage, support, and alimony payments to his former wife is a fraudulent conveyance, notwithstanding the fact that the amount of the confessed judgment was a fair equivalent of the antecedent debt, since the former husband and the third party knew that executing such a judgment would have the effect of hindering, delaying, and, for practical purposes, eliminating the former wife's ability to recover such arrears which were then unprotected by judgment. Accordingly, the confession of judgment was not made in good faith with respect to the husband's known creditor and must be set aside.⁴

On the other hand, a basis for setting the judgment aside is lacking where there is no evidence to warrant an inference that the judgment was confessed wilfully for the purpose of hindering or delaying creditors. By itself, a confession of judgment is

not a badge of fraud.⁵ The transaction may be sustained where it appears that a note on which judgment was confessed was given for an adequate consideration.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Atlas Nat. Bank v. More](#), 152 Ill. 528, 38 N.E. 684 (1894).
- 2 [Puget Sound Nat. Bank v. Levy](#), 10 Wash. 499, 39 P. 142 (1895).
- 3 [Woodfolk v. Seddons](#), 154 U.S. 658, 14 S. Ct. 1216, 31 L. Ed. 598 (1880).
- 4 [Spear v. Spear](#), 101 Misc. 2d 341, 421 N.Y.S.2d 277 (Sup 1979).
- 5 [Coryell v. Olmsted](#), 64 Colo. 378, 172 P. 14, 14 A.L.R. 5 (1918).
- 6 [Coryell v. Olmsted](#), 64 Colo. 378, 172 P. 14, 14 A.L.R. 5 (1918).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 50

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 50. Release, cancellation, or surrender of obligation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  28, 48

The cancellation of a note constitutes a transfer, and where the debtor does not receive reasonably equivalent value for the cancellation, and is insolvent at the time, the transaction constitutes a fraudulent conveyance.¹ The forgiveness by a debtor of a debt—for example, the collusive cancellation and surrender of a bond or note by a judgment debtor to his or her debtor, involving as between them the discharge of the latter from the obligation—is a fraudulent transfer which a judgment creditor may have set aside in equity and hold his or her debtor's debtor to account for the amount of the debt.² Similarly, a debtor/tenant's release or cancellation of subleases, without consideration, rendering the debtor/tenant insolvent supports a fraudulent conveyance claim by the tenant's creditor.³

Even as a fraudulent transfer of property may take the form of a release or cancellation of a debt or claim, it may take the form of a satisfaction of judgment notwithstanding that in the absence of fraud, the law permits a debt or obligation to be satisfied for less than the full amount.⁴

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [McBirney v. Paine Furniture Co.](#), 2003 WL 21094555 (Mass. Super. Ct. 2003) (applying Massachusetts law).
- 2 [Hall & Farley v. Alabama Terminal & Improvement Co.](#), 143 Ala. 464, 39 So. 285 (1905).
- 3 [NPR, LLC v. Met Fin Management, Inc.](#), 63 A.D.3d 1128, 882 N.Y.S.2d 253 (2d Dep't 2009).
- 4 [Nissim Hadjes, Inc. v. Hasner](#), 408 So. 2d 819 (Fla. 3d DCA 1982).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 51

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions

A. In General

§ 51. Failure or refusal to assert legal right or accept benefit

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  15, 32

A debtor's refusal to assert a legal right or to accept a benefit cannot, it seems, be deemed to be conduct which is fraudulent as to his or her creditors. The circumstance that a contract or conveyance is shown to have been oral and hence is unenforceable by reason of the Statute of Frauds does not affect the rights of creditors of the obligee or grantor. Although the latter may set up the statute and thereby escape liability, his or her creditors do not have this right.¹ For example, creditors of a decedent's son were not entitled to set aside the son's renunciation of his rights to his father's succession and to obtain judicial approval to accept the decedent's succession on the son's behalf where the creditors failed to allege and prove that the son fraudulently renounced his rights in his father's succession and that this act rendered him insolvent or augmented his antecedent insolvency.²

A disclaimer of a previously vested, but still undistributed, beneficial interest in a trust is not a transfer of any "interest of the debtor in property," of the kind which could be challenged as an alleged fraudulent transfer, where under the state's disclaimer statute, the effect of the disclaimer is that the debtor is treated as having died immediately prior to the event that resulted in the vesting of the trust interest.³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Miller v. Sire](#), 224 F. 424 (C.C.A. 2d Cir. 1915).
- ² [Succession of Andrews](#), 604 So. 2d 194 (La. Ct. App. 2d Cir. 1992).
- ³ [In re Faulk](#), 281 B.R. 15 (Bankr. W.D. Okla. 2002).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 52

American Jurisprudence, Second Edition | May 2021 Update

Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

III. Nature and Form of Transfer; Particular Acts and Transactions


A. In General

§ 52. Failure or refusal to assert legal right or accept benefit—Testamentary provisions in behalf of debtor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  15, 32

West's Key Number Digest, [Wills](#)  717(1), 867

Election by a devisee or legatee to accept or reject a devise or bequest has generally been held not to affect the legal rights of his or her creditors. Election is a personal right and cannot be controlled by the creditors.¹ Although the subject matter of the devise or bequest, if it has been accepted by the debtor, may, as a general rule, be reached by the creditors,² such creditors have no cause of action by reason of the fact that their debtor has renounced a testamentary provision under which he or she might have claimed a benefit.³

On the other hand, one of the indicia of fraud can be the renunciation of an inheritance.⁴ An insolvent person cannot, without a consideration, defeat his or her creditor by application of the doctrine of a "letting go" or waiver of a vested tangible interest as heir in the estate of a decedent.⁵ Thus, a judgment debtor's renunciation of an interest in the debtor's mother's estate constitutes a fraudulent conveyance where the debtor previously accepted an interest in the estate by voluntarily contracting to transfer it.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Harding's Adm'r v. Harding's Ex'r](#), 140 Ky. 277, 130 S.W. 1098 (1910).
- ² [Re Qua v. Graham](#), 187 Ill. 67, 58 N.E. 357 (1900).
- ³ [Schoonover v. Osborne](#), 193 Iowa 474, 187 N.W. 20, 27 A.L.R. 465 (1922).
- ⁴ [Matter of Reed's Estate](#), 566 P.2d 587 (Wyo. 1977).
- ⁵ [Bostian v. Milens](#), 239 Mo. App. 555, 193 S.W.2d 797, 170 A.L.R. 424 (1946).

6 [State Bank of Long Island v. Munson, 95 A.D.3d 1133, 944 N.Y.S.2d 295 \(2d Dep't 2012\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.